VIEWS OF MR. McMORRAN.

I regret that I have not been able to agree with my colleagues as to the report; my ideas being at wide variance with theirs upon the construction of the evidence and upon the necessary remedies. I also recognize that the method of the investigation has been of an unusual character, entirely different from anything that I have ever witnessed during my experience in Congress. I refer to the agreement under which no member of the committee has been permitted to interrogate witnesses upon subjects material to the investigation.

I have given the testimony in the case careful consideration and have tried to draw my conclusions from an unbiased standpoint, and my conviction is that my conclusions, as embodied in the following report, are correct and for the best interests of the American people.

While I believe that attention has been called in the course of this investigation to grave deficiencies in our financial laws, I also believe that a sinister light has been thrown over many banking practices which was not justified by the facts, that no effort has been made to show the reasonable and commendable explanation of these practices, and that in many cases an impression has been given to the country as to the character and motives of leading bankers which is altogether unfair. A sentiment has been created throughout the country against Wall Street, and many of our good citizens do not realize what it means that New York City has become one of the world's leading money markets, and that the banks of New York and their associates are now able to handle large transactions which they were unable to handle only a few years since, when our people were forced to look to foreign markets for assistance in developing the various industries and commercial undertakings of the country.

I feel that every American citizen should be proud of the fact that we have a city like New York, where there is sufficient capital to handle these enterprises, and should take pride also in the character and integrity of the men who are at the head of its large financial institutions.

The Clearing Houses.

As regards the clearing houses, under the present organization of our banking these associations of necessity exercise many important functions and bear many responsibilities which would not be forced upon them under a properly organized banking and currency system. I believe that it is fortunate, in view of the deficiencies in our banking law, that the community has been able to depend upon these associations to maintain proper standards of banking in normal times and to afford relief in times of emergency. I believe that the man-

agement and conduct of these associations have been generally characterized by broadmindedness and public spirit rather than by a selfish desire for personal profit, as the questioning of witnesses frequently implied, and that these associations have rendered inestimable service to the country not only in normal times in providing means for the exchange and collection of checks but particularly in periods of stress in arranging for the mutualization of reserves among the banks, in providing temporary markets for the rediscount of commercial paper and other banking assets, and in otherwise supplying necessary agencies which our banking system at present lacks.

The intimation in some of the questions to witnesses and in certain parts of the report that the members of the clearing-house committees have exercised these powers for the suppression of competing banks is, I believe, unjust and without foundation in fact. In the testimony relating to the Oriental Bank and the Mechanics & Traders Bank I regret very much that the full facts relative to the action of the clearing house toward these institutions was not spread upon the record, and I am inclined to think that had the facts been fully presented a different impression would have been given as to the action taken by the clearing-house committee.

The Stock Exchanges.

I believe that it should also be recognized that the New York Stock Exchange has contributed much to the development of the transportation, industrial, and commercial activities of the country, and that its affairs have been conducted by men of repute and standing in the community, and that judged by the magnitude of its transactions, in the light of the tendency of all men at times to err, it is remarkable that the rules governing its transactions have been so faithfully observed and enforced.

The Concentration and Control of Money and Credit.

I believe that much of the evidence in regard to the concentration and control of money and credit submitted to the subcommittee, both statistical evidence and the testimony adduced through the questioning of witnesses, has been seriously incomplete and misleading, and that no such harmony of motive and action has been shown to exist between the dozen or 18 large banks in different cities which have been repeatedly named as would justify the description of these banks as a "group" or as an "inner group," or as would in any way justify the assertion contained in the majority report that "the acts of this inner group, as here described, have been more destructive to competition than anything accomplished by the trusts."

In my opinion the method of argument or inference used in connection with the elaborate charts and tables presented to the committee is wholly mistaken. It is not reasonable to select a list of the largest financial institutions in the leading cities and then to assume that because some of these institutions are associated from time to time in occasional transactions that the whole number constitutes a group following a concerted policy with a united purpose, nor is it

fair to assume that because few transactions of $10,000,000 or more can be named which have not been handled by one or another of these large institutions (whose names have been selected for this purpose because of their size) that this so-called "group" has suppressed competition.

As to the claim of centralization of the money power in the city of New York, the fact that within the past 10 years the number of banks in the United States has increased from 10,000 to 25,000 certainly demonstrates that competition in banking facilities has increased throughout the country, and the fact that the resources of the New York banks amounted to 23.2 per cent of the country's resources in 1900 and to only 18.9 per cent in 1912 shows that banking growth has been more rapid elsewhere than in New York.

Proposed Legislation.

In regard to most of the proposals for legislation which have been brought to the attention of the committee, I feel bound to affirm my apprehension that their adoption would sound the knell of the national banking system. I believe that the establishment of a Federal system of banking, with uniform laws and regulations throughout the country, marked a distinct and important milestone in our financial history, and I regard the possibility of its discontinuance as a very grave and serious objection to the general character of the legislation proposed.

I believe that there are fundamental defects in our banking laws which require remedy at the earliest possible date, and that many of the banking practices which have aroused apprehension, and to which criticism has been directed in this investigation, are the result of those defects and are likely to disappear when a proper banking and currency system has been established.

I would respectfully submit that the immediate need of the country is for banking legislation upon a general scientific plan, and I sincerely hope that the attention of Congress will not be diverted from these important and fundamental needs by any prior attempt at fragmentary enactments.

Recommendations of the Committee.

With respect to the specific recommendations of the majority, I desire to submit the following special considerations:

SECTION 1, AS REGARDS CLEARING-HOUSE ASSOCIATIONS.

Under the present organization of our banking the associations connected with the clearing houses must perform many functions and exercise great responsibilities which would not be necessary under a proper banking and currency system. With the existing very deficient banking law the community has to depend upon these associations for the protection and maintenance of standards of banking and for financial relief and assistance in emergencies. On this account great care must be exercised in framing any restrictive

legislation in order not to hamper the clearing houses in exercising these functions.

A. *Incorporation and regulation.*—It would be dangerous to give Government officials the ultimate power of decision in all clearing-house questions, first, because immediate action is often necessary in such matters (at the time of the failure of the Walsh banks in Chicago it was only by the concerted action of the clearing-house committee, taken at midnight, upon an hour's notice, that a frightful banking cataclysm in Chicago was avoided); second, because these questions often concern the extension of credit to banks by other banks, and such questions could not be appropriately decided by Government officials. The incorporation of clearing houses in so far as it involved such interference on the part of Government officials would be most harmful. In cases where a decision must be made within a few hours as to the further extension of credit to a bank or as to its exclusion from clearing-house privileges the necessity of delaying until the consent of Government officials could be obtained might work great injury to the other banks connected with the clearing house and to other creditors as well. Moreover, the lack of freedom of action on the part of the clearing-house officials would make it impossible for those who were responsible for the protection of the banking situation in a community to take such action as was immediately necessary.

B. *Admission of all banks.*—The minimum capital qualification for membership in certain clearing houses does not exclude small banks from the facilities of the clearing house, but it is intended as a protection for the other banks by preventing the easy acquisition of membership in a clearing house by dishonest institutions. As already stated, under our present system the clearing-house organizations bear unusual responsibility in maintaining proper standards of banking in their communities and in arranging for mutual assistance among the banks in periods of stress. It is essential, because of those responsibilities, that the association should keep its membership clear of the representatives of questionable and unscrupulous interests. On that account the organization must have the right to prescribe certain qualifications for membership.

C. *Examination of members.*—Unquestionably the employment of clearing-house examiners, which began in Chicago a decade ago and which has been adopted in Kansas City, St. Louis, San Francisco, and a number of other cities, including more recently New York, marked a step in the right direction and has kept the banking situation clearer and stronger in those communities than it ever was before. The criticism which has been raised that these examinations allow certain banks inside information in regard to other banks is invalid in most cities where, under the regulations governing the examination, the members of the clearing-house committee receive no detailed information from the examiner as to the business of particular banks except when those banks are discovered to be in a dangerous condition. It should be borne in mind that in the clearing-house associations each bank has only one vote, regardless of its size, and a bank with $1,000,000 capital has no less influence than a bank twenty-five or more times its size. If any member has grounds of complaint he can easily submit them to the association, where the majority of banks, which means the smaller banks, have

the power to decide. In the Associated Banks of New York there are 64 members, and it takes a majority of 33 distinct institutions to control the association.

D. *Issuance of clearing-house certificates.*—Here again we have to do with a function which the clearing houses assume only because of the grave defects in our banking law. If our banks had available any reserves of cash or credit to which they could appeal in times of trouble or any market in which they could transmute into cash their solvent assets it would be unnecessary for the clearing-house associations to resort to the makeshift of loan certificates, but in default of such agencies the clearing-house associations have rendered inestimable service during the panics of the last half century or more in preventing the utter collapse of all business. At such times they have organized, through their committees, temporary rediscount markets and have virtually pooled their reserves, and until some other agency for rediscounting and for mutualizing reserves has been provided we shall probably have to resort to these associations in times of financial trouble. As, however, the issuance and acceptance of loan certificates means nothing else than the extension of credit by certain institutions to other institutions, their issue and acceptance and retirement can only be decided upon by the banks themselves and are not within the province of the Government.

E. *Regulation of rates for collecting out-of-town checks.*—The real reason for the establishment of uniform collection charges was never brought out in the evidence. Before the establishment of such charges, when out-of-town checks and drafts were subject to no discount, millions and millions of such paper were sent back and forth from one place to another throughout the country wherever a balance was owing from one bank to another. This caused much needless expense of bookkeeping and kept in ostensible life a vast amount of credit which had no real reason for existence. The establishment of collection charges, by creating a slight discount on such checks, has resulted in the immediate return of checks to the bank upon which they were drawn for payment, and has vastly curtailed the amount of fictitious credit which formerly resulted from their continued and repeated remittance.

In the testimony it was asserted that the charges for the collection of checks by the clearing-house banks of New York City were of an arbitrary character, amounting to 70 cents per thousand. I am not in a position to say that the charge was unreasonable, but it is a matter which should receive the serious consideration of the clearing house. I believe, of course, that the banks are entitled to fair compensation for the collection of out-of-town checks.

F. *The regulation of rates of discount and of interest on deposits, etc.*—The instances where clearing houses have attempted to regulate these rates are extremely rare. Such regulations are not germane to the functions of clearing houses, and I see no reason why they should not be prohibited.

SECTION 2, AS REGARDS THE NEW YORK STOCK EXCHANGE.

So far as further regulation of the exchanges is required, I believe that such regulation should be exercised by the legislatures of the several States and not by Congress. As measures are now pending before the Legislature of the State of New York covering practically every phase of the existing situation, including the incorporation of exchanges, manipulation, the rehypothecation of securities, etc., the intervention of Congress would seem unwarranted.

The recommendation of the majority that the use of the mails, telegraph, and telephone by the Stock Exchange of New York should be prohibited unless it is incorporated or reorganized in other ways, is, in my opinion, a very drastic and unwarranted recommendation and would tend to create a sentiment throughout the country that the members of the New York Stock Exchange are a group of unscrupulous men. In view of the character of the majority of the men who are charged with the control of the exchange, I believe that they will be able to correct any evils that have been developed, and in my judgment the discipline which can be enforced under the present organization is better and more effective than could be brought about under incorporation.

SECTION 3, AS REGARDS CONCENTRATION OF CONTROL OF MONEY AND CREDIT

A. *Consolidation of banks.*—It is at least open to question whether the Comptroller of the Currency has not now the authority to prevent the consolidation of national banks, but there is no serious objection to a definite attribution to him of such power.

B. *Interlocking bank directorates.*—No real evil has been shown to result from the existence of such directorates. The adoption of this provision, although it would involve no serious consequence, would deprive certain banks of real advantages which they now enjoy. A man who has broad experience, who knows the standing of all the individuals and firms in a community, may render real service on the boards of various financial institutions, and it is altogether unlikely that he would be retained on such boards if he used his influence to suppress competition or for the advancement of his own selfish interests.

C. *Voting trusts in banks.*—No real evils are shown to have resulted from such voting trusts. No evidence was submitted of such trusts ever having existed in national banks. There is no objection, however, to this legislation.

D. *Cumulative voting.*—This proposition is fraught with great danger. Cumulative voting would give dishonest interests an opportunity to appoint a director in order, perhaps, to accredit themselves by membership on the board of an institution of first-class standing. As a result a reputable bank might find itself with a man upon its board of such character as to discredit the whole institution. Dishonest interests might also use such power to secure information regarding the affairs of a corporation which would be of advantage to its competitors, or in order to make trouble in other directions. No evidence was presented to show that the minority stockholders of any banks suffer from lack of control over the banks.

If there were any way to allow a minority stockholder representation without incurring this very great danger, such a plan would be indorsed.

E. *Security-holding companies as adjuncts to banks.*—Great care must be exercised in framing legislation not to so hamper or restrict the national banks as to stimulate their reorganization under State charter. The banking laws of most States allow the State banks and trust companies to perform kinds of business which the national banking law does not allow. On that account State banks and trust companies have developed very rapidly in the course of the last 15 years as compared with Federal institutions. There are scarcely no advantages to a bank to-day from the possession of a Federal charter. The privilege of holding Government deposits, the tenuous prestige of a Federal charter, the very small profit accruing from note issue are the only advantages, and against these must be set many limitations and disadvantages of other sorts. The organization of subsidiary State banks, trust companies, and security companies, with indissoluble stock ownership between the national banks and the subsidiary company, is a method which has been devised of allowing the stockholders in a national bank to secure some of the profits from the kinds of business allowed to State banks and trust companies without trespassing either upon the letter or the spirit of the law. The assets and liabilities of each institution are distinct from those of the other, and the liabilities of one can not be jeopardized by any impairment of the assets of the other. It would seem, therefore, that this is a legitimate and safe method of extending the functions of national banks without any risk to the creditors.

Since their offices and officers are closely related, or identical, there are certain obvious dangers in the possibility of exchanging loans and assets between the two institutions, and provision should therefore be made for the simultaneous examination of both institutions by Federal and State examiners. This is now the practice in the case of national banks and trust companies that are owned by the same stockholders, but it is not necessarily the case with the so-called security companies which have State charters and which are not subject to State banking supervision. We would recommend the adoption of a requirement for simultaneous examination by the national and State bank examiners in the case of all State chartered institutions owned by the same persons or substantially the same persons who own the stock of a national bank.

G. *Fiscal agency agreements.*—This seems an unnecessary and unjustified interference with the business of large corporations which, like smaller corporations and individuals, must rely upon banks or banking houses for financial advice and assistance. An individual business man generally finds it an advantage to deal continuously with the same bank. If he is a regular customer of the bank in good times as well as in bad times, and if his affairs are thoroughly well known to the banker over a long period of time, he can depend upon the banker much more confidently for assistance, even in periods of general unsettlement, than he could without such permanent relations. With large corporations it is very much the same. It is as good policy for them as for individuals to deal regularly with particular banks which become thoroughly conversant with the details of their

business and which are morally, if not technically, bound to see them through every contingency.

It is of course possible to prohibit fiscal agency agreements, but this would not prevent a corporation from dealing with the banks or bankers that serve him best.

H. *Private bankers as depositaries.*—I see no reason for prohibiting interstate corporations from depositing their funds with private bankers. No evidence has been adduced to show that such corporations have suffered loss by depositing in private banks, nor are they apt to suffer loss in this way, since their deposits are protected not merely by the assets and working capital of those firms, but also by the entire property of all of the partners. If there is any risk in such deposits, it is not clear why the large interstate corporations which may be assumed to be well able to look after their affairs should be singled out for protection rather than the smaller State corporations and individuals.

I. *Banks not to engage in underwritings.*—This seems an unreasonable restriction. Industrial companies and railroads are important factors in our economic life, and they are developed by means of the issue of securities. It would be a mistake to take any such step as would curtail their development.

J. *Investments of banks in bonds.*—I see no reason why national banks should be prohibited from investing more than 25 per cent of their capital and surplus in bonds. The character of thoroughly legitimate and useful banking differs among banks in different localities; it differs from one institution to another, and from time to time in the same institution. Some banks all of the time, and many banks some of the time, find their most useful and profitable service in lending for longer periods of time by means of bonds, and there is no reason why this form of banking should be interfered with. Communities in many cases are more effectively served by investments in bonds than by investments in commercial paper. On this point the committee entirely overlooks the fact that it may be of greater ultimate advantage to a merchant to have the transportation facilities of his city increased than to have a little readier market for his own notes. It might perhaps be of advantage to limit the amount of bonds of a particular corporation which may be held by a bank to a certain proportion of the capital and surplus, but legislation is scarcely necessary for this purpose. If bank examinations are properly conducted, excessive holdings of particular securities would be prevented.

K. *Reform of railroad organization.*—Any plan by which the holder of a single share can defeat an undertaking is open to the serious objection that it gives a power which may be easily abused to dishonest persons who make a practice of blackmail. Several notable instances have been cited in the testimony of individuals who make a practice of purchasing single shares of stock merely to make trouble for the majority stockholders.

L. *Railroad reorganization under supervision of Interstate Commerce Commission.*—I see no objection to this proposal beyond the obvious fact that the commission is already overburdened with duties.

M. *Interstate railroad security issues under supervision of Interstate Commerce Commission.*—The objection just mentioned applies even more pertinently here. The Interstate Commerce Commission

already has enough to do without passing upon these matters. Such issues often have to be made quickly, and the delay incident to their reference to this commission might be very harmful.

N. *Competitive bidding for interstate security issues.*—This plan would probably work satisfactorily in times of easy money when banking houses were searching for business, but in periods of tight money and unsettlement large corporations might find themselves in very serious straits, and either quite unable to obtain necessary financial aid, or able only to obtain it at tremendous loss. As already said, a corporation in its relation with a bank is like an individual customer in that if it deals continually with the same bank it is sure of accommodation in periods of general stress as well as in time of prosperity, and is certainly in a position to secure better advice and fairer terms on the average than a corporation that is only an occasional customer.

O. *Borrowings by officers from their own banks.*—This prohibition of such borrowing is wise and to be commended.

P. *Borrowings by directors from their own banks.*—A provision that borrowings by directors should only be permitted on condition that notice shall have been given to the codirectors is not objectionable, but the suggestion that the Comptroller of the Currency should give full publicity in his annual report to every such loan is thoroughly objectionable. The directors of most banks are the best customers of those banks. It would be unjustified and unwise to restrict them in this way or to prevent them from doing business with their banks.

Q. *Borrowing by officers of another bank.*—I see no reason for prohibiting such borrowing. It would interfere with the quite legitimate practice by which bank officers to-day acquire interests in their banks by means of loans from other banks, a practice to be encouraged, as it increases the interest of the officers in the bank

R. *Financial transactions of bank officers to be in their own names.*—I see no objection to this proposal.

S. *Participation by bank officers and directors in underwritings.*—This provision seems wise in so far as officers of banks are concerned, but not as regards directors. The directors of most banks are the best customers of those banks, and as the directors have very little or nothing to do with the determination of the daily business of banks, there seems no sufficient reason for preventing them in this way from engaging in transactions in which the bank is interested.

T. *Accepting and offering rewards for bank loans.*—This seems an altogether proper regulation.

U. *Limitation of number of directors of banks.*—A provision of this sort would probably make the directors more active and more responsible. On the other hand, it doubtless would work injury to certain banks whose directors at present bring business to the institutions. I do not feel that this provision is of great importance, but, on the whole, am inclined to recommend it.

V. *Publicity for assets and stockholders of banks.*—It is doubtful whether anything would be gained by requiring the publication of the stockholders of banks. Depositors can not know much about the actual property holdings of the shareholders. The names of the directors are published, and, in general, include the largest stockholders. Their standing is known, and the character of the bank is

determined by it. The publication of the stockholders of banks would probably be offensive to many individuals who do not like to have their private affairs made public, and to that extent the publication would tend to depress the value of bank stocks. In case of the failure of a bank, the publicity of the names of stockholders might possibly result in apprehension with regard to their solvency because of their double liability, and it might thereby entail far-reaching unsettlement. One result of such a provision would be the insertion of many fictitious names on the stockholders' list, which, in view of the double liability of stockholders, would be unfortunate. On the whole, we are not inclined to recommend this proposal.

As regards the publication in detail of security holdings, it would be objectionable and it might be dangerous to enforce such requirement. If, for instance, a bank happened to hold the securities of a corporation which failed, and the public was aware of those investments, a run upon the bank might result even though the loss did not in the least jeopardize the deposits or other liabilities of the bank. The public, in other words, must be protected from itself. The one and only justification for secrecy in banking matters is that a little knowledge is apt to be a very dangerous thing. It is unquestionably dangerous for those who do not know all about a bank's condition to know too much. It is sufficient that the bank examiners and the directors are familiar with those details. The depositor and the individual stockholder must put their trust in the directors and officers and examiners. If the Comptroller of the Currency and his examiners can not safeguard the public in this matter, the comptroller's office might as well be abolished.

Respectfully submitted.

HENRY MCMORRAN.

O

419 The President of the United States of America to William Henkel, United States Marshal for the Southern District of New York, Greeting:

We command you, that you have the body of George G. Henry, which you imprisoned and detained, as it is stated, together with the time and cause of such imprisonment and detention, by whatsoever name the said George G. Henry is called or charged, forthwith before the District Court of the United States for the Southern District of New York, at the United States Courts and Post Office Building, in the Borough of Manhattan, City of New York, to do and receive what shall then and there be considered concerning said George G. Henry; and have you then and there this writ.

Witness, Hon. George C. Holt, Judge of the District Court of the United States, this 7th day of March, 1913.

[Seal U. S. District Court, S. D. of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

Let the foregoing writ issue.

JULIUS M. MAYER,
United States District Judge.

The hearing on the above writ is hereby adjourned to March 20, 1913, at 2 p. m. The time of the Marshal to make return to or any motion with respect to the writ is hereby extended to the 20 day of March 1913. In the meantime, the petitioner may be admitted to bail in the sum of $2,000. Bail may be taken by any commissioner.

Dated the 7 day of March, 1913.

JULIUS M. MAYER,
United States District Judge.

420 [Endorsed:] United States District Court, Southern District of New York. George G. Henry, Petitioner, vs. William Henkel, United States Marshal for the Southern District of New York. In the Matter of the petition of George G. Henry for a writ of habeas corpus. Writ of habeas corpus.

421 District Court of the United States, Southern District of New York.

UNITED STATES
vs.
GEORGE G. HENRY.

SIRS: Please take notice that upon all the proceedings had herein before Commissioner Shields and upon the commitment issued to the United States Marshal for the Southern District of New York, dated March 7, 1913, the undersigned will apply to the Judge holding the general motion calendar of the United States District Court

appointed to be called on Friday, March 14, 1913, at 10:30 A. M., in the Federal Building, Borough of Manhattan, City of New York, for a warrant for the removal of George G. Henry from the Southern District of New York to the District of Columbia, pursuant to the provisions of Section 1014 of the Revised Statutes.

Dated: March 8, 1913.

Yours, etc.,

HENRY A. WISE,
United States Attorney.

To Messrs. Cravath & Henderson, Attorneys for George G. Henry, 52 William Street, New York, N. Y.

422 [Endorsed:] U. S. District Court, Southern District of New York. United States versus George G. Henry. Notice of Motion for Warrant of Removal. Henry A. Wise, United States Attorney, Attorney for U. S. Copy received Mar. 8, 1913. Cravath & Henderson, Attorneys for ——. U. S. District Court. Filed Mar. 28, 1913. S. D. of N. Y.

423 District Court of the United States, Southern District of New York.

GEORGE G. HENRY, Petitioner,
vs.
WILLIAM HENKEL, United States Marshal for the Southern District of New York.

SIRS: Please take notice that William Henkel, United States Marshal, will apply to the Judge holding the general motion calendar of the United States District Court appointed to be called on Friday, March 14, 1913, at 10:30 A. M., in the Federal Building, Borough of Manhattan, City of New York, for an order quashing the writ of habeas corpus granted herein on March 7, 1913, upon the papers upon which said writ was granted.

Yours, etc.,

HENRY A. WISE,
United States Attorney.

Dated: March 8, 1913.

To Messrs. Cravath & Henderson, Attorneys for Petitioners, 52 William Street, New York, N. Y.

424 [Endorsed:] United States District Court, Southern District of New York. George G. Henry, Petitioner, versus William Henkel, United States Marshal for the Southern District of New York. Notice of Motion to Quash Writ of Habeas Corpus. Henry A. Wise, United States Attorney, Attorney for U. S. Copy Received Mar. 8, 1913. Cravath & Henderson, Attorneys for ——. U. S. District Court. Filed Mar. 28, 1913. S. D. of N. Y.

425 United States District Court, Southern District of New York.

GEORGE G. HENRY, Petitioner,
vs.
WILLIAM HENKEL, United States Marshal for the Southern District of New York.

In the Matter of the Petition of GEORGE G. HENRY for a Writ of Habeas Corpus.

To the United States District Court for the Southern District of New York:

I, William Henkel, United States Marshal for the Southern District of New York, do hereby make the following return to the Writ of Habeas Corpus herein issued out of the District Court of the United States for the Southern District of New York on the 7th day of March, 1913.

I. That, in obedience to said writ the body of George G. Henry was produced in Court, on March 7th, 1913, and said George G. Henry was admitted to bail pending the argument on said writ.

II. George G. Henry named in said writ of Habeas Corpus, was taken into custody by me on the 7th day of March, 1913, under a commitment issued to me by John A. Shields, Esquire,
426 United States Commissioner for the Southern District of New York, dated March 7th, 1913, a copy of which commitment is annexed to the petition for Writ of Habeas Corpus and marked "A."

III. That said commitment is annexed to a warrant issued to me by John A. Shields, Esquire, United States Commissioner for the Southern District of New York, dated February 14th, 1913, commanding me to apprehend George G. Henry, named in said Writ of Habeas Corpus, and to bring his body forthwith before said Commissioner, that he may be dealt with according to law for the offence charged against him, a copy of which warrant, with the endorsements thereon, is annexed to the petition for writ of Habeas Corpus and marked "E."

IV. That referred to in said warrant and annexed thereto, is a copy of a complaint, on removal, made before said John A. Shields, Esquire, Commissioner, for the Southern District of New York sworn to the 14th day of February, 1913, a copy of which complaint is annexed to the petition for writ of Habeas Corpus and marked "B."

Wherefore respondent prays that said Writ of Habeas Corpus may be dismissed and that said George G. Henry be remanded to the custody of respondent to be dealt with according to law.

Dated, New York, March 19th, 1913.

WILLIAM HENKEL,
United States Marshal, Southern District of New York.

427 SOUTHERN DISTRICT OF NEW YORK, *ss:*

William Henkel, being duly sworn, says, that he is United States Marshal for the Southern District of New York; that the foregoing return is true to the knowledge of deponent.

WILLIAM HENKEL.

Subscribed and Sworn to before me this 19th day of March, 1913.

ALEX. GILCHRIST, JR.,
U. S. Comm'r.

428 [Endorsed:] United States District Court, Southern District of New York. George G. Henry, Petitioner, vs. William Henkel, United States Marshal for the Southern District of New York. Return to Writ of Habeas Corpus. Henry A. Wise, United States Attorney, Attorney for Resp't.

429 In the District Court of the United States for the Southern District of New York.

GEORGE G. HENRY, Petitioner,
vs.
WILLIAM HENKEL, United States Marshal for the Southern District of New York.

In the Matter of the Petition of GEORGE G. HENRY for a Writ of Habeas Corpus.

The above-named petitioner, George G. Henry, in answer to the return of William Henkel, United States Marshal for the Southern District of New York, to the writ of habeas corpus herein, respectfully shows that the commitment returned by the said William Henkel, Marshal as aforesaid, as the cause of your petitioner's detention, is void and of no effect, and was issued in violation of your petitioner's rights, privileges and immunities under the Constitution and laws of the United States, for the reasons set forth in the petition for the issuance of the said writ, to which your petitioner here now refers with the same force and effect as though the said petition were incorporated herein and set forth at length.

Wherefore your petitioner prays for an order discharging him from the custody of the said Marshal.

Dated the 25th day of March, 1913.

CRAVATH & HENDERSON,
Attorneys for the Petitioner.

430 UNITED STATES OF AMERICA,
Southern District of New York, ss:

George G. Henry being duly sworn deposes and says that he has read the foregoing traverse and knows the contents thereof, and that the same is in all respects true.

GEORGE G. HENRY.

Sworn to before me this 25th day of March, 1913.
JOHN A. SHIELDS,
U. S. Commissioner.

431 [Endorsed:] United States District Court, Southern District of New York. George G. Henry, Petitioner, vs. William Henkel, United States Marshal for the Southern District of New York. In the Matter of the Petition of George G. Henry for a Writ of Habeas Corpus. Traverse. U. S. District Court, S. D. of N. Y. Filed Mar. 28, 1913.

432 At a Stated Term of the District Court of the United States for the Southern District of New York, at the United States Courts and Post-Office Building, in the Borough of Manhattan, City of New York, on the 28th Day of May, 1913.

Present: Hon. Julius M. Mayer, Judge.

GEORGE G. HENRY, Petitioner,
against
WILLIAM HENKEL, Marshal for the Southern District of New York.

In the Matter of the Petition of GEORGE G. HENRY for a Writ of Habeas Corpus.

A writ of habeas corpus having been issued herein on the 7th day of March, 1913, upon a petition filed herein on the said last mentioned day, commanding the above named William Henkel, United States Marshal for the Southern District of New York, to produce the body of the said George G. Henry forthwith before this Court, and the said George G. Henry having been on the 7th day of March, 1913, produced before this Court in obedience to the command of the said writ, and the hearing on the said writ having been thereupon adjourned and the time to make return thereof or any motion in respect thereto extended to the 20th day of March, 1913, and the petitioner having been in the meantime admitted to bail to abide the determination of this Court, and the said William Hen-
433 kel, United States Marshal as aforesaid, having on the said 10th day of March, 1913, made return of the said writ, and having also moved to quash the same, and the petitioner having filed his answer to the said return, and the cause having thereupon come on for hearing and argument having been made thereon by the Hon. John C. Spooner of counsel for the petitioner in support of the said writ, and by John E. Walker, Esq., an Assistant United States Attorney for the said district in opposition thereto,

Now on reading and filing the said writ of habeas corpus and the said petition and return and the answer to the said return and notice of the said motion to quash, and due deliberation being had thereon, on motion of H. Snowden Marshall, Esq., United States Attorney for the Southern District of New York, it is

Ordered that the said writ of habeas corpus be and the same

hereby is discharged and that the petitioner be and he is hereby remanded to the custody of the said William Henkel, United States Marshal as aforesaid.

JULIUS M. MAYER, *D. J.*

434 [Endorsed:] United States District Court, Southern District of New York. George G. Henry, Petitioner, against William Henkel, Marshal for the Southern District of New York. In the Matter of the Petition of George G. Henry for a Writ of Habeas Corpus. Order Discharging Writ and Remanding Petitioner. Cravath & Henderson, Attorneys for Petitioner, No. 52 William Street, Borough of Manhattan, New York City. U. S. District Court, S. D. of N. Y. Filed May 28, 1913.

435 United States District Court, Southern District of New York.

GEORGE G. HENRY, Petitioner,
vs.
WILLIAM HENKEL, United States Marshal for the Southern District of New York.

John C. Spooner, Paul D. Cravath, John D. Lindsay and Stuart McNamara, all of New York City, for petitioner.

Henry A. Wise, United States Attorney, and John E. Walker, Assistant United States Attorney, for respondent.

MAYER, *District Judge:*

On February 10, 1913, petitioner was indicted by the Grand Jury of the Supreme Court for the District of Columbia, charged with an offense under section 102 of the Revised Statutes, in that on January 7, 1913, while a witness before a Committee of the House of Representatives, acting under a resolution duly passed by the House, he refused to answer certain questions propounded to him on behalf of the Committee which questions were pertinent to the matter under inquiry by the said Committee.

The usual proceedings for removal to the District of Columbia under section 1014 of the Revised Statutes, were instituted
436 and the United States Commissioner found probable cause and committed the petitioner to the custody of the Marshal to await a warrant of removal. Thereupon a writ of habeas corpus was issued to inquire into the legality of petitioner's detention.

In the proceedings before the Commissioner, petitioner demanded an examination and after the denial of a motion for the dismissal of the complaint, the Government introduced in evidence the indictment and bench warrant and petitioner's identity being conceded, the Government rested.

Petitioner then moved again for the dismissal of the complaint and after the denial of that motion, counsel for petitioner introduced in evidence a transcript of petitioner's entire testimony before the House Sub-committee and the majority and minority re-

ports of that Sub-committee. No question of fact is involved and the sole inquiry is as to whether there existed "probable cause" to justify the issuance of the warrant.

On April 25, 1913, the House of Representatives adopted House Resolution No. 504, which is set forth at length in the indictment and need not be here repeated.

That resolution authorized an inquiry into many subjects, "as a basis for remedial and other legislative purposes." One of the subjects was the relation of national banks in various directions and, in that connection, inquiry was made in regard to transac-
437 tions in which officers of such banks engaged as affecting, among other things, the actions of banks in regard to loans, the listing of securities on the New York Stock Exchange, the distribution of securities and the participation in syndicates or underwritings of officers of national banks.

It is unnecessary to consider whether Congress had power to inquire into certain of the subjects referred to in the resolution, for it is apparent that Congress had full authority to inquire into the matters set forth in paragraph "Second" of the resolution in so far as they related to national banks.

In the course of this inquiry, the petitioner was questioned and testified at considerable length concerning a corporation called California Petroleum Corporation, (hereinafter referred to as California Company). The details of this inquiry are too lengthy to be recited in this memorandum and it will suffice to state that there came a time in the course of the inquiry when petitioner was asked the names of national banks and officers of national banks who participated in the syndicate operations (described in the testimony) of the California Company. It appeared that there were four partners in this syndicate and the petitioner declined to state the name of the fourth partner in the syndicate.

From the indictment, as well as the testimony of the peti-
438 tioner, it seems that he had stated that no national bank had participated in the syndicate so that there were really but two questions which he refused to answer.

Section 102 of the Revised Statutes reads as follows:

"SEC. 102. Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers, upon any matter under inquiry before either House, or any Committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months."

It is unnecessary to consider certain questions raised as to the extent to which the court may go in a proceeding of this character for there can be no doubt that the court may examine all the evidence before the Commissioner with a view to determining whether "probable cause" existed and if, in this particular case, either of the

refusals of petitioner to answer was in respect of a question "pert
nent to the question under inquiry," then the technique of pr
cedure becomes unimportant.

The petitioner urges that no offense is charged because the sul
committee was without authority, under the Constitution, upon a
inquiry purely in aid of legislation, to compel any testimony con
cerning the California Petroleum Syndicate, and in the interestin
brief submitted on his behalf, many decisions are collate
439 and discussed. I think, however, that the question unde
consideration is not as far-reaching as the petitioner contends

Congress had power to ascertain whether a national bank par
ticipated directly or indirectly in the organization of Californi
Company, or the listing of its securities or the participation in any
underwriting or syndicate relating to such securities.

Surely such an inquiry would not be an exercise of the visitoria
powers which Congress has vested in courts of justice and in the
Comptroller of the Currency.

An examination of the National Banking Act will show that Con
gress has affirmatively permitted and affirmatively prohibited certain
kinds of transactions and these provisions are presumably based upon
appropriate information and the result of judgment and experience.
With many changes in industrial conditions, and in methods of
business and, with the increasing and complex problems affecting
the National Banking System, Congress could inform itself of the
course of conduct of officers of national banks as affecting the banks,
to determine whether such course should be thereafter continued,
modified or prohibited.

How far Congress could pursue its inquiry, need not at this time
be academically considered.

We are concerned only with a particular question asked of
440 the petitioner which he refused to answer.

Certainly, the Committee could receive such testimony as
the petitioner was willing to give. He had already testified without
objection that there were fifteen national bank officers who were
members of the Syndicate and also that it was customary to offer
syndicate participation to national bank officers and sometimes to
national banks themselves.

In asking the petitioner the names of these national bank offi-
cers, the Committee did not at that point ask a question which can be
construed as encroaching upon the domain of visitorial power. The
Committee in that question, made no inquiry as to the details of any
transactions about the national banks but solely about the officers.

Petitioiner contends that if Congress deemed this practice an evil
it already had the information needed to frame legislation in respect
thereof and that the further knowledge of the identity of the par-
ticular officers could not help. Whether the Committee could have
made further inquiry through such officers as to collateral loans or
other affairs of the banks of which they were officers, presents a
question which need not be decided because such a line of inquiry
is not here to be passed upon. The sole question was the identity of
these national bank officers.

The fact that the Committee had already heard testimony
441 to the effect that such officers engaged in participation, did not preclude the Committee from obtaining cumulative information upon that point.

The Committee may have considered it desirable to make this inquiry in numerous instances, with a view of ascertaining whether such participations were engaged in frequently and throughout the country, or only by the same set of officers of the same national banks, or whether such engagements were only occasional. As a result of such an inquiry Congress may have drawn conclusions upon which to base legislation.

In point of fact, the Committee did recommend that officers and directors of national banks should be prohibited from participating in syndicates or promotions or underwritings of securities in which their banks may become interested as underwriters or owners or lenders; but even though the Committee made this recommendation upon the testimony before it, it may very well have determined to cite this (and other instances) in support of its conclusions and recommendations.

The official conduct of national bank officers is regulated by statute; a national bank springs into existence solely as a creature of statute and while not attempting to define the extent or the limits of a Congressional inquiry, it certainly cannot be said that this
442 particular question invaded the constitutional rights of this petitioner.

Whether the petitioner could have been compelled to answer the question as to who was the fourth member of the Syndicate, presents a proposition quite different from that just discussed and in that regard no opinion need now be expressed.

Finally, it seems to me that the controversy is really within a narrow compass so far as this proceeding is concerned and as one of the questions seems to have been pertinent, probable cause existed and the commissioner should be sustained.

The writ will be discharged, the petitioner remanded to the custody of the Marshal, and a warrant of removal will issue.

May 26, 1913. JULIUS M. MAYER, *D. J.*

443 District Court of the United States for the Southern District of New York.

GEORGE G. HENRY, Appellant,
against
WILLIAM HENKEL, Marshal for the Southern District of New York.

In the Matter of the Petition of GEORGE G. HENRY for a Writ of Habeas Corpus.

The petitioner and appellant above named, feeling himself aggrieved by the final order made and entered herein by this Court on the 28th day of May, 1913, discharging the writ of habeas corpus

heretofore sued out by him and remanding him to the custody of the said William Henkel, United States Marshal as aforesaid, now comes by Cravath & Henderson, his solicitors and counsel, and petitions the Court for an order allowing him to prosecute an appeal on the said final order to the Supreme Court of the United States, according to the laws of the United States in that behalf made.

The petitioner is advised by counsel that there are grave doubts as to whether the proceedings referred to in the petition herein have not infringed the rights of the petitioner under the Constitution and laws of the United States, and whether his detention under
444 and by virtue of the mandate and by virtue of the commitment referred to in the petition is not wholly without authority of law, and the petitioner desires in good faith to submit constitutional questions involved herein and such other questions as are presented to the Supreme Court of the United States for their determination; and for the leave asked herein your petitioner will ever pray, etc.

Dated, New York, May 28th, 1913.

G. G. HENRY, *Petitioner.*

Cravath & Henderson, Attorneys for Petitioner, 52 William Street, Borough of Manhattan, City of New York.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

George G. Henry, the petitioner above named, being duly sworn, deposes and says; that he has read the foregoing petition and knows the contents thereof; that the same is in all respects true.

G. G. HENRY.

Sworn to before me this 28th day of May, 1913.

JULIUS M. MAYER, *D. J.*

The foregoing petition and appeal is granted, and it is

Ordered that pending determination of the said appeal and after decision thereon and until the further order of this Court all proceedings herein and all proceedings for the removal of the petitioner to the District of Columbia under and by virtue of the proceedings referred to in the petition for a writ of habeas corpus herein,
445 be and they are hereby stayed; and it is further

Ordered that pending the said appeal the said George G. Henry be released on bail to await the decision and the determination of the said appeal. Supersedeas bond fixed at Two Thousand Dollars ($2,000.00). Let any United States Commissioner take bond accordingly.

Dated, May 28th, 1913.

JULIUS M. MAYER,
United States District Judge.

446 [Endorsed:] United States District Court, Southern District of New York. George G. Henry, Appellant, against

William Henkel, Marshal for the Southern District of New York. In the Matter of the Petition of George G. Henry, for a Writ of Habeas Corpus. Petition and Order Allowing the Appeal, etc. Cravath & Henderson, Attorneys for Petitioner No. 52 William Street, Borough of Manhattan, New York City. U. S. District Court. Filed May 28, 1913. S. D. of N. Y.

447 District Court of the United States for the Southern District of New York.

GEORGE G. HENRY, Appellant,
against
WILLIAM HENKEL, Marshal for the Southern District of New York.

In the Matter of the Petition of GEORGE G. HENRY for a Writ of Habeas Corpus.

Comes now the petitioner and appellant, George G. Henry, by Cravath & Henderson his attorneys and counsel, and in connection with his petition for the allowance of an appeal to the Supreme Court of the United States from the order of this Court entered the 28th day of May, 1913, discharging the writ of habeas corpus heretofore sued out by him and remanding him to custody, makes and files the following assignment of errors:

The Court erred:

(1) In discharging the said writ of habeas corpus and remanding the petitioner to custody.

(2) In holding that the petitioner's restraint and detention under the commitment mentioned in the petition was not without authority of law.

(3) In holding that the petitioner was not deprived of his liberty under the said commitment in violation of his rights, privi-
448 leges and immunities under the Constitution and Laws of the United States.

(4) In holding that John A. Shields, Esq., the Commissioner who issued the said commitment was not without authority, power or jurisdiction under the Constitution and Laws of the United States by reason of any of the matters and things contained and set forth in the complaint mentioned in the said petition or in the indictment therein mentioned, or either of them, or by reason of anything presented or adduced upon the examination before the said Commissioner, to entertain any charge against the petitioner or to act or proceed in any manner in the premises.

(5) In refusing to hold that at the time the petitioner attended before the sub-committee of the Committee on Banking and Currency of the House of Representatives and gave his testimony before it, and at the time he refused to answer the questions which are set forth in the said indictment, the said sub-committee was engaged in no investigation or inquiry and was conducting no proceeding upon which the petitioner could be required or com-

pelled under the Constitution and Laws of the United States to testify or give evidence before the said sub-committee.

(6) In holding that the resolution of the House of Representatives of April 25, 1912, directing the investigation and inquiry in and upon which the petitioner was examined as a witness before the said sub-committee, known as House Resolution No. 504, was not passed and adopted without and in excess of any power conferred upon the House of Representatives by the Constitution of the United States.

(7) In holding that the passage and adoption of the
449 said resolution did not constitute an encroachment upon the powers conferred by the Constitution on the judicial branch of the Government.

(8) In holding that in conducting the investigation and inquiry thereby directed, the said sub-committee did not assume a power which could only be exercised by the judicial branch of the Government.

(9) In holding that the said resolution, in so far as it undertook to require the petitioner to testify as a witness before the said committee in respect of the transactions, matters and things concerning which he was interrogated by and before the said committee beyond what he voluntarily chose to tell, and particularly in so far as it undertook to compel the petitioner to testify before the said committee of and concerning the names of officers of national banks who had participated in the syndicate operations of the California Petroleum Company referred to in the said indictment, was not passed and adopted without and in excess of any power vested in the House of Representatives by the Constitution.

(10) In holding that the said resolution conferred upon the said sub-committee any power or jurisdiction to require or compel the petitioner to answer any of the questions which were propounded to him upon his examination before the said sub-committee.

(11) In holding that the matters sought to be elicited by the questions which the petitioner refused to answer when interrogated before the said sub-committee, were and are not the petitioner's personal and private affairs.

(12) In holding that the matters sought to be so elicited
450 were not matters in respect of which neither the House of Representatives nor the said sub-committee had nor can have under the Constitution any right, power, jurisdiction or authority whatsoever to compel the testimony of the petitioner solely in aid of the legislative function.

(13) In holding that the said resolution in so far as it undertook to authorize the said sub-committee to inquire of and concerning the names of officers of national banks who had participated in the syndicate operations of the California Petroleum Company, was not passed and adopted in violation of Title LXII of the Revised Statutes and was not for that reason wholly null and void.

(14) In holding that any of the questions which the petitioner refused to answer on his examination as a witness before the said sub-committee was pertinent to any matter within the jurisdiction

of the House of Representatives which was at the time before it for consideration or proper for its examination or to any fact bearing thereon.

(15) In holding that the said indictment charged a crime or offense against the laws of the United States.

(16) In holding that the evidence given before the said Commissioner and upon which he issued the said commitment showed probable cause to believe that the petitioner had been guilty of any such crime or offense.

(17) In holding that the Congress of the United States has power under the Constitution and Laws of the United States, to constitute the matters and things specified in the said indictment a crime or offense against the United States.

451 (18) In holding that the petitioner's refusal to answer the questions propounded to him during his examination and testimony as a witness before the said sub-committee, as set forth in the said indictment, in manner and form as therein alleged, constituted a crime or offense under any law of the United States.

(19) In construing section 102 of the Revised Statutes as applicable to an inquiry by a sub-committee of a Committee of the House of Representatives solely in aid of the legislative function.

(20) In holding that the last mentioned section as so construed was a valid and constitutional enactment.

(21) In holding that the last mentioned section was intended to or does make the acts specified in the indictment herein a crime or offense against the United States.

(22) In construing section 1014 of the Revised Statutes as authority for the petitioner's removal to the District of Columbia upon the facts disclosed in the said petition.

Wherefore the petitioner prays that the order discharging the said writ of habeas corpus and remanding the petitioner to the custody of the said William Henkel, Marshal as aforesaid, be reversed and that the petitioner be discharged from custody.

G. G. HENRY, *Petitioner.*

Cravath & Henderson, Attorneys for Petitioner, 52 William Street, Borough of Manhattan, City of New York.

452 [Endorsed:] United States District Court Southern District of New York. George G. Henry, Appellant, against William Henkel, Marshal for the Southern District of New York. In the Matter of The Petition of George G. Henry for a Writ of Habeas Corpus. Assignment of Errors. Cravath & Henderson, Attorneys for Petitioner, 52 William Street, Borough of Manhattan New York City. U. S. District Court. Filed May 28, 1913, S. D. of N. Y.

453 In the Supreme Court of the United States.

GEORGE G. HENRY, Appellant,
against
WILLIAM HENKEL, Marshal for the Southern District of New York.

In the Matter of the Petition of GEORGE G. HENRY for a Writ of Habeas Corpus.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the above named William Henkel, United States Marshal for the Southern District of New York:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden in the City of Washington in the District of Columbia, on the 23rd day of June, 1913, pursuant to the appeal duly allowed by the United States District Court for the Southern District of New York, and filed in the office of the Clerk of said Court on the 28th day of May, 1913, wherein the above named George G. Henry is appellant and you are appellee, to show cause, if any there be, why the final order of the said District Court rendered against the said George G. Henry as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George C. Holt, District Judge of
454 the United States for the Southern District of New York, this 28th day of May, 1913.

JULIUS M. MAYER,
United States District Judge.

455 [Endorsed:] Supreme Court of the United States. George G. Henry, Appellant, against William Henkel, Marshal for the Southern District of New York. In the Matter of the Petition of George G. Henry for a Writ of Habeas Corpus. Citation. U. S. District Court, S. D. of N. Y. Filed May 28, 1913. Cravath & Henderson, Attorneys for Petitioner, No. 52 William Street, Borough of Manhattan, New York City. Due and timely service of a copy of the within — is hereby admitted. Dated, New York, May 28, 1913. H. Snowden Marshal, U. S. Attorney, Att'y for William Henkel, U. S. Marshal.

456 United States District Court, Southern District of New York.

GEORGE G. HENRY
against
WILLIAM HENKEL, United States Marshal, &c.

In the Matter of the Application of GEORGE G. HENRY for a Writ of Habeas Corpus.

To the Clerk of the United States District Court for the Southern District of New York:

You will please prepare the transcript of the record in this cause, to be filed in the office of the Clerk of the Supreme Court of the United States, under the appeal heretofore perfected to said Court, and include in said transcript the following papers and portions of the record;

(1) Petition of petitioner appellant for Writ of Habeas Corpus, with Exhibits A, B, C, D, E, F and G.

(2) Writ of Habeas Corpus.

(3) Motion of the United States Attorney for warrant of removal.

(4) Motion of the United States Attorney to quash the writ of habeas corpus.

(5) Return of United States Marshal to the Writ of Habeas Corpus.

457 (6) Traverse of return.

(7) Order discharging Writ of Habeas Corpus and remanding petitioner appellant to the custody of the Marshal.

(8) Opinion of the Court.

(9) Petition of petitioner appellant for appeal from said order to the Supreme Court of the United States; order allowing said appeal and fixing bail.

(10) Assignment of errors.

(11) Citation.

(12) And this præcipe, with acceptance and stipulation annexed.

Said transcript, which eliminates all papers not necessary to the consideration of the questions to be reviewed, to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the said Supreme Court at Washington, D. C. on or before July 15, 1913.

CRAVATH & HENDERSON,
Attorneys for George C. Henry, Petitioner-Appellant.

Office & Post Office Address, No. 52 William Street, Borough of Manhattan, City of New York.

Due and timely service of the above præcipe, and of a copy thereof, is hereby admitted; and it is stipulated that all papers not designated in the above schedule shall be eliminated from the tran-

script to be prepared on appeal, and that the above designation includes all papers and portions of the record necessary to the consideration of the questions to be reviewed.

Dated New York, July 8th, 1913.

H. SNOWDEN MARSHALL,
United States Attorney, Southern District of New York, Attorney for William Henkel, Appellee.

458 [Endorsed:] United States District Court, Southern District of New York. George G. Henry, against William Henkel, United States Marshal, &c. In the Matter of the Application of George G. Henry for a Writ of Habeas Corpus. Praecipe. Cravath & Henderson, Attorneys for Petitioner-AppT't. No. 52 William Street, Borough of Manhattan, New York City.

459 United States District Court, Southern District of New York.

GEORGE G. HENRY
against
WILLIAM HENKEL, United States Marshal, etc.

In the Matter of the Application of GEORGE G. HENRY for a Writ of Habeas Corpus.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing printed copy is a true transcript of the record in the above entitled matter as agreed on by the parties thereto.

Dated, New York, July 8, 1913.

CRAVATH & HENDERSON,
Attorneys for Petitioner-Appellant.
H. SNOWDEN MARSHALL,
U. S. Attorney for the Southern District of New York, Attorney for William Henkel, Appellee.

460 UNITED STATES OF AMERICA,
Southern District of New York, ss:

GEORGE G. HENRY
vs.
WILLIAM HENKEL, United States Marshal, etc.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

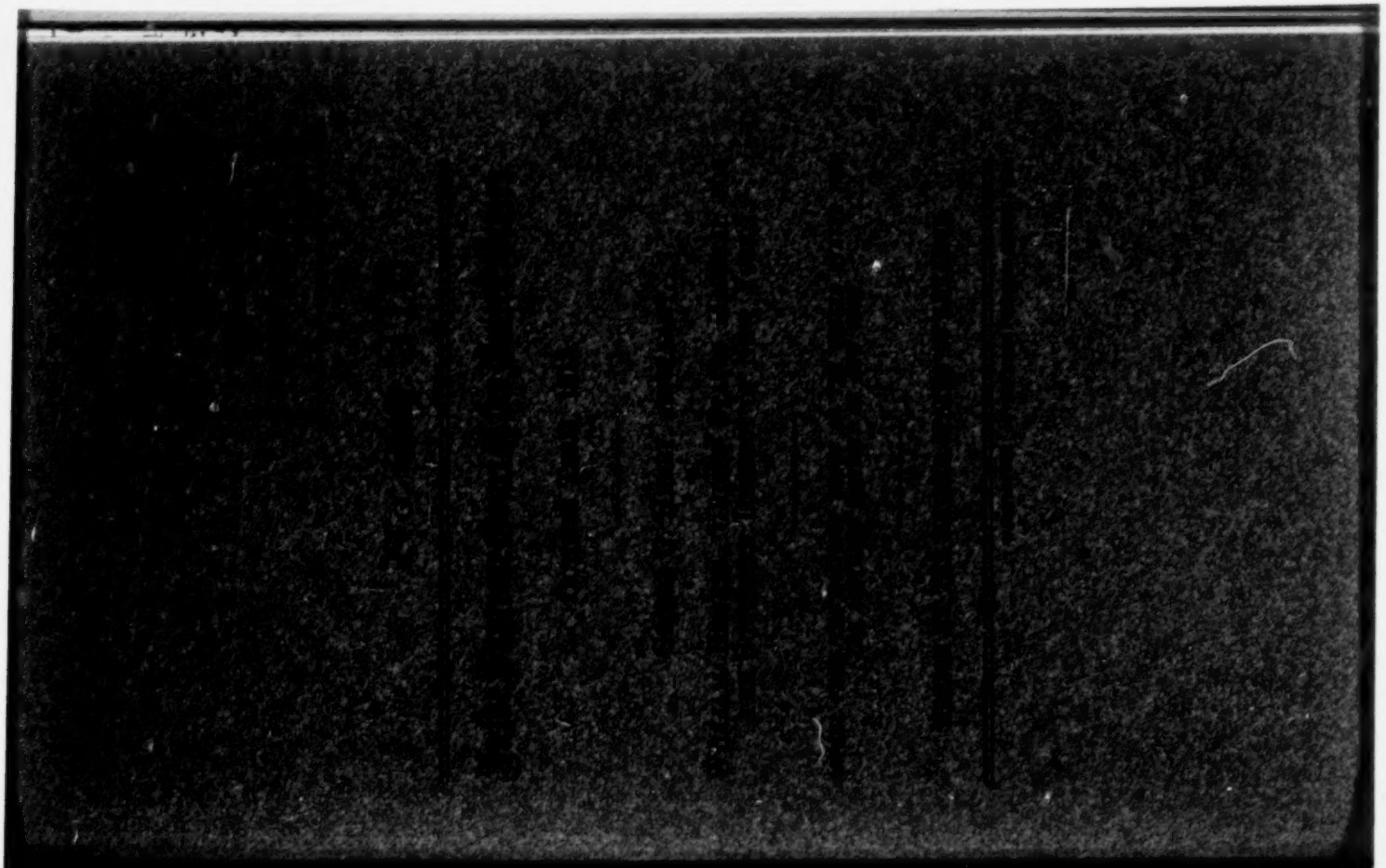
In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern

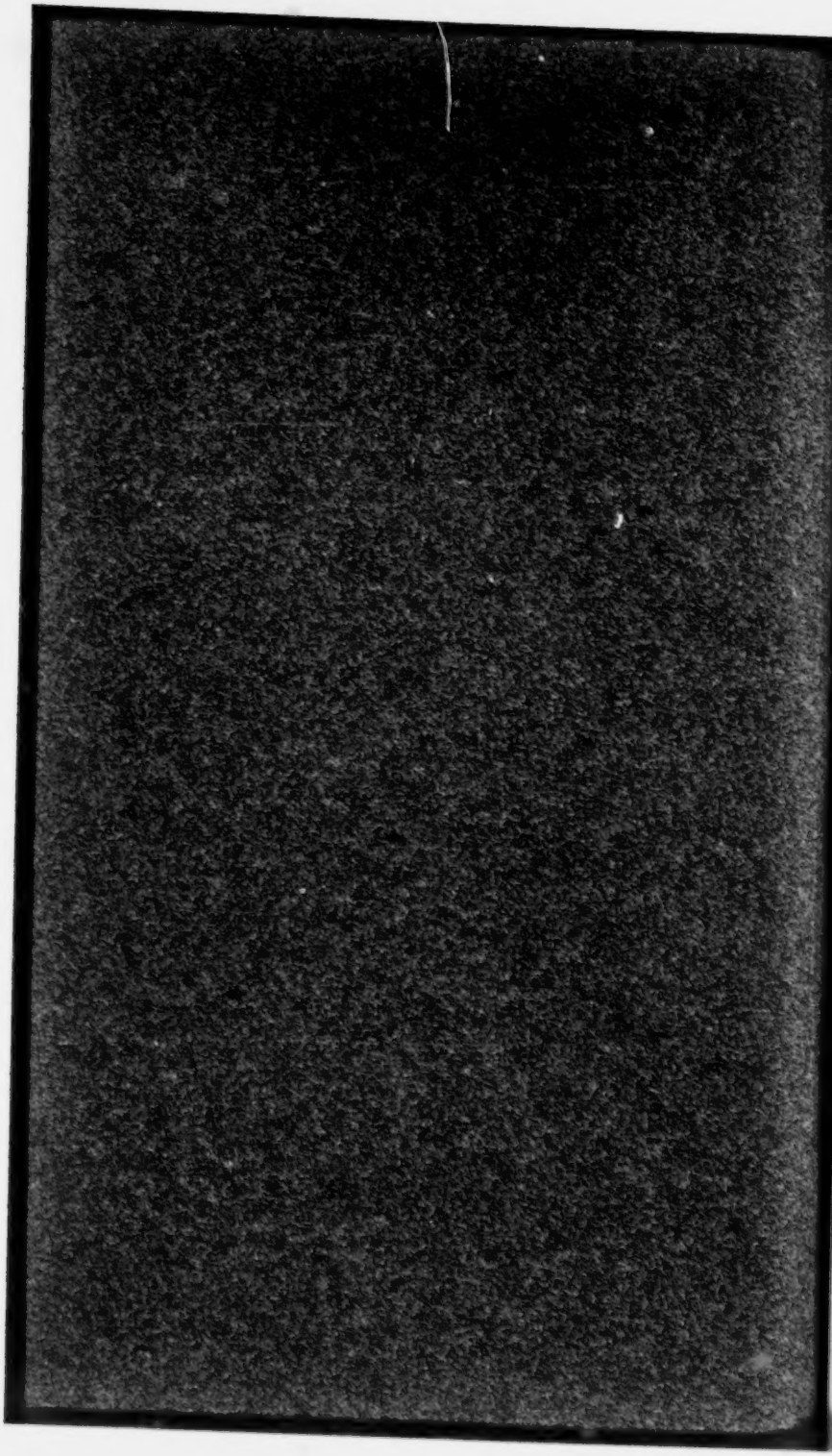
District of New York, this 8th day of July in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-eighth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

Endorsed on cover: File No. 23,790. S. New York D. C. U. S. Term No. 639. George G. Henry, appellant, vs. William Henkel, United States marshal for the southern district of New York. Filed July 11th, 1913. File No. 23,790.





In the Supreme Court of the United States.

OCTOBER TERM, 1913.

GEORGE G. HENRY, APPELLANT, v. WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York.	No. 639.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the appellee, respectfully moves the court to advance the above-entitled cause for argument.

This is an appeal from an order of the District Court discharging a writ of habeas corpus.

Appellant was indicted in the Supreme Court of the District of Columbia for violating sections 102, 103, and 104 of the Revised Statutes, by refusing to answer questions put to him as a witness before the subcommittee of the Committee on Banking and Currency of the House, appointed under H. Res. 429, 62d Cong., 2d session (amended by H. Res.

17003—13

504), to conduct the so-called "Money Trust Investigation."

Appellant was a partner of the New York banking firm of William Salomon and Company, and was being questioned in regard to a certain syndicate transaction of the California Petroleum Company in which that firm took part. He was asked "the name of national banks and officers of national banks who participated" in that operation and declined to answer. He had already testified, however, that no national banks were participants. He was also asked to state the name of the fourth partner in the syndicate known as the "Banking Group," an inner circle in this same syndicate transaction, and refused. He had previously testified that this fourth partner was a New York banking firm.

The usual removal proceedings were had under R. S., sec. 1014, and appellant was brought before the United States Commissioner in the Southern District of New York. Upon the examination, appellant moved a dismissal on the ground that the indictment stated no offense against the laws of the United States. The commissioner, overruling this motion, committed appellant to the custody of the marshal.

The petition attacked the jurisdiction of the commissioner on the grounds, *inter alia*, that House Resolution 504 was unconstitutional as an encroachment upon the constitutional powers of the judicial branch of the Government; that the questions peti-

tioner refused to answer related to the private and personal affairs of the petitioner and his firm, and were therefore matters into which neither the House nor the committee had power under the Constitution to inquire in aid of the legislative function; that if R. S., secs. 102, 103, and 104, covered the acts charged in the indictment, they were unconstitutional and void.

The District Court in its opinion passed only on the power of the subcommittee to ask the question relating to officers of national banks, and held that question to be within the constitutional powers of the subcommittee, and hence that the indictment showed probable cause for removal.

The case, therefore, presents the important constitutional questions of the validity of R. S., secs. 102, 103, and 104, and of the House Resolutions above mentioned.

Notice of this motion has been given opposing counsel.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1913.

O

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 216

GEORGE G. HENRY,
Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT.

JOHN C. SPOONER,
PAUL D. CRAVATH,
JOHN D. LINDSAY,
STUART McNAMARA,
Of Counsel for Appellant.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

INDEX.

List of Cases.

* Digest of Decisions and Precedents; Senate Misc. Doc. No. 278; 53rd Cong., 2nd Sess.

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 639.

GEORGE G. HENRY, Appellant,

vs.

WILLIAM HENKEL, United States Marshal for the Southern District of New York.

BRIEF FOR THE APPELLANT.

Appeal from an order of the District Court for the Southern District of New York, entered May 28th, 1913, discharging a writ of *habeas corpus* sued out by the appellant to determine the legality of his detention under a commitment issued by JOHN A. SHIELDS, ESQUIRE, United States Commissioner, whereby the appellant was committed to the custody of the appellee pending the issuance by the District Judge of a warrant for his removal to the District of Columbia for trial on an indictment which had been returned by the Grand Jury of that District, February 10, 1913, charging the appellant with an alleged violation of Sections 102-4 of the Revised Statutes (Record, pp. 337-8).

THE STATUTE WHICH THE APPELLANT IS ACCUSED OF HAVING VIOLATED.

The forerunner of Section 102 of the Revised Statutes was the Act of January 24, 1857, entitled, "An Act more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony" (11 Stat., 155, c. 19), which read as follows:

"1. That any person summoned as a witness by the authority of either House of Congress to give testimony or to

produce papers upon any matter before either House, or any committee of either House of Congress, who shall wilfully make default, or who, appearing, shall refuse to answer any question pertinent to the matter of inquiry in consideration before the House or committee by which he shall be examined, shall in addition to the pains and penalties now existing, be liable to indictment as and for a misdemeanor, in any Court of the United States having jurisdiction thereof, and on conviction, shall pay a fine not exceeding one thousand dollars and not less than one hundred dollars, and suffer imprisonment in the common jail not less than one month nor more than twelve months.

"SEC. 2. That *(sic)* no person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject to any penalty or forfeiture for any fact or act touching which he shall be required to testify before either House of Congress or any committee of either House as to which he shall have testified *whether before or after the date of this act*, and that no statement made or paper produced by any witness before either House of Congress or before any Committee of either House, shall be competent testimony in any criminal proceeding against such witness in any court of justice; and no witness shall hereafter be allowed to refuse to testify to any fact or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact or the production of such paper may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid.

"SEC. 3. That when a witness shall fail to testify, as provided in the previous sections of this act, and the facts shall be reported to the House, it shall be the duty of the Speaker of the House or the President of the Senate to certify the fact under the seal of the House or Senate to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

In 1862 (12 Stat., 333), the immunity provision of the Act of 1857 was repealed by an amendment making Section 2 read as follows:

"That the testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness in any court of justice: *Provided, however*, That no official paper or record,

produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so to protect such witness from any criminal proceeding as aforesaid; and no witness shall hereafter be allowed to refuse to testify to any fact, or to produce any paper touching which he shall be examined by either House of Congress, or any committee of either House, for the reason that his testimony touching such fact, or the production of such paper, may tend to disgrace him or otherwise render him infamous: *Provided*, That nothing in this act shall be construed to exempt any witness from prosecution and punishment for perjury committed by him in testifying as aforesaid."

When the Act of 1857, as thus amended, was carried into the Revised Statutes, it was divided into four separate sections, viz:

"SEC. 102. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

"SEC. 103. No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

"SEC. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

"SEC. 859. No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

The Removal Proceeding.

The proceeding which resulted in the Appellant's commitment was instituted under Section 1014 of the Revised Statutes which is as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

The complaint charged, on information and belief, that the appellant, on January 7, 1913, having appeared as a witness before a sub-committee of the Committee on Banking and Currency of the House of Representatives, refused to answer certain questions propounded to him by the counsel to the sub-committee which were pertinent to the investigation then being conducted by the Committee. Annexed to the complaint was an exemplified copy of the indictment which had been returned against the appellant in the District of Columbia, also the bench warrant issued thereon (Record, pp. 6-9).

1. The Indictment.

The allegations of the indictment may be conveniently divided into four parts, viz.:

(*a*) The resolution under which the sub-committee conducted its inquiry.

(*b*) The matters which had been adduced prior to appellant's appearance before the sub-committee.

(*c*) The information which the appellant voluntarily gave.
(*d*) The questions which he refused to answer.

(*a*) *The resolution under which the sub-committee conducted its inquiry.*

The investigation was directed by a resolution of the House, adopted April 25, 1912, (H. R. No. 504), which is set forth at length in the indictment. In brief, it attempted to authorize an inquiry into the New York Stock Exchange, the Clearing House, life insurance companies, the fiscal and banking affairs of interstate corporations, campaign contributions, the activities of a few "groups of financiers" in New York and elsewhere, national banks, and many other subjects, "as a basis for remedial and other legislative purposes" (*Id.*, pp. 10–16).

After reciting that it had been ascertained that a prior resolution (H. Res., 429) was "insufficient in the delegation of its powers to permit of the scope of inquiry which is believed to be necessary as a basis for remedial legislation on the subjects covered by this resolution," and after referring to pending currency and banking legislation and bills to amend and supplement the anti-trust law, and to regulate corporations engaged in interstate commerce (pp. 11, 12), the resolution further recited:

(a) That "it has been charged, and there is reason to believe, that the management of the finances of many of the great industrial and railroad corporations of the country engaged in interstate commerce is rapidly concentrating in the hands of a few groups of financiers in the City of New York, and their associates in New York and other cities, and that these groups, by reason of their control over the funds of such corporations and the power to dictate the depositories of such funds, and by reason of their relations with the great life insurance companies with headquarters in New York City, and by other means, have secured domination over many of the leading national banks and other moneyed institutions and life insurance companies in the City of New York and other cities to which they direct such patronage and over the vast deposits of money and of the other assets of such institutions, thus enabling them and their associates to direct the operations of the latter in the use of the money belonging to their depositors and the stockholders and in the purchase and sale of securities and loans of money by such banks and other

moneyed institutions and life insurance companies, and that these institutions and their funds are being used to further the enterprise and increase the profits of these groups of individuals from such transactions and to augment their power over the finances of the country, and to control the money, exchange, security, and commodity markets, and prevent competition in the enterprises in which they are interested to the detriment of interstate commerce and of the general public" (p. 12).

(*b*) That "it has been further charged and is generally believed that these same groups of financiers have so intrenched themselves in the control of the aforesaid financial and other institutions, and otherwise in the direction of the finances of the country that they are thereby enabled to use the funds and property of the great national banks and other moneyed corporations in the leading money centres to control the security and commodity markets; to regulate the interest rates for money; to create, avert and compose panics; to dominate the New York Stock Exchange and the various clearing house associations throughout the country, and through such associations and by reason of their aforesaid control over the aforesaid railroads, industrial corporations and moneyed institutions, and others, and in other ways resulting therefrom, have wielded a power over the business, commerce, credits and finances of the country that is despotic and perilous and is daily becoming more perilous to the public welfare" (*Id.*).

(*c*) That "the national banks and other moneyed institutions controlled as aforesaid are charged to have been, and to be, engaged in the promotion, underwriting and exploitation of speculative enterprises, and in the purchase and sale of securities of such enterprises, and in acquiring, directly or indirectly, stocks of other banking institutions and absorbing competitors and in using their corporate funds and credit for such purposes, either alone or in conjunction with those by whom they are controlled (pp. 12–13), and

(*d*) That "it is deemed advisable to gather the facts bearing on the aforesaid conditions and charges as a basis for remedial and other legislative purposes" (p. 13).

The resolution thereupon assumed to authorize and direct a sub-committee of eleven members of the Committee on Banking and Currency,

FIRST, to "fully investigate and inquire into each and all of the above recited matters and into all matters, and subjects connected with, or appurtenant to, or bearing upon the same" (*Id*).

SECOND, "to fully inquire into and investigate, among other things, whether and to what extent" certain conditions which are enumerated—twelve in number—prevail, and among them, "whether and to what extent" (*h*) "the funds or credit of national banks * * * are or have been employed: First, in the purchase of securities from bankers or others in any way interested in or connected with such corporations; second, in the guaranty or underwriting of securities or syndicate transactions * * * (*i*) "any national bank * * * has speculated or is speculating in stocks, and if so, the nature of all such transactions and the profits and all other details thereof", (*j*) "the management and operation of the New York Stock Exchange * * * are, or may be, directly or indirectly, dominated, controlled or otherwise affected by any individuals or groups of individuals who control or are influential in directing the use or deposit of the funds of national banks in the City of New York", etc., and (*k*) "any individual, firm or corporation, or any one or more groups * * * may or can affect the security markets of the country through the New York Stock Exchange" (pp. 13–15).

THIRD. "To investigate, find and report the facts bearing upon the payment of political contributions to national campaign funds by or in the interest of national banks and interstate railroad and industrial corporations" (p. 15); and

FOURTH. "To investigate the methods of financing the cash requirement of interstate corporations and of marketing their securities, and the relations of national banks and others to such transactions" (*Id.*).

The fifth clause authorized the committee as a whole, or by sub-committee, to sit during the sessions of the House and during the recess of Congress, to hold its meetings in such cities and places as it might from time to time designate, and furthermore, required its hearings to be "open to the public". The same clause authorized the committee to employ "counsel, experts, accountants, bookkeepers, clerical and other assistants," to summon and compel the attendance of witnesses, to "send for persons and papers" and to "administer oaths to witnesses"; and "*directed*" the Comptroller of the Currency, the Secretary of the Treasury and the Commissioner of the Bureau of Corporations, and their respective assistants and subordinates, "to comply with all directions of the committee for assistance in its labors, to place at the service of the Com-

mittee all the data and records of their respective departments, to procure for the committee, from time to time, such information as is subject to their control or inspection, and to allow the use of their assistants for the making of such investigations with respect to corporations under their respective jurisdictions as the committee, or any sub-committee, might from time to time direct *(Id.)*.

The resolution concluded with a clause by which the House proffered to witnesses immunity from prosecution with respect to any matter or thing concerning which they might be interrogated and as to which they should truthfully make answer under oath upon the investigation *(Id.*, pp. 15, 16).

(b) The matters which had been adduced prior to the appellant's appearance before the sub-committee.

Prior to the appellant's appearance before it, the sub-Committee had, by the examination of witnesses, adduced evidence tending to prove

"that in the City of New York, State of New York, there was a certain voluntary association of individuals known as and called the New York Stock Exchange, which for many years had and still did maintain a certain building and place in said City commonly called the New York Stock Exchange, with essential facilities for the purchase and sale of the capital stock, bonds and other forms of securities, of corporations organized and doing business in the United States and foreign countries, including the great railroad, industrial, mercantile and banking corporations carrying on their business throughout the said United States, and between the several States; that before the securities of said corporations could be dealt in by purchase, sale or otherwise, on the Exchange, it was, by the rules of said "New York Stock Exchange," required that such securities be listed by said "New York Stock Exchange," that is to say, that by orders of a certain committee of said "New York Stock Exchange," to wit, the Governing Committee, to whom the authority was delegated, such securities be allowed to become the subject of purchase and sale upon and in the Exchange; that by reason of the magnitude of trading through purchase and sale of corporate securities as aforesaid on the Exchange the Exchange had become and was the leading market in the United States, as well as a great World market, for the purchase and sale of securities as aforesaid. That the quotations for the purchase and sale of such securities on the Exchange were daily disseminated,

distributed and published through and by means of the mails of the United States and by means of the telegraph and by the daily newspapers throughout the United States, and were generally accepted and adopted by interested persons, firms and corporations concerned in the ownership, the purchase and sale and otherwise in such securities, as a basis for fixing and determining the market value of such securities; that in the City of New York there were many banks, including National Banks of the United States, which made a practice of lending money and accepting as collateral security for the repayment thereof the stocks, bonds and other forms of securities so listed and dealt in on the Exchange, and that in ascertaining and determining the values of said corporate securities as such collateral for the loans so granted by them as aforesaid, the said banks and the officers thereof, exercising the authority of granting loans therefor as aforesaid, did very generally consider and accept the said quotations for the purchase and sale of corporate securities as they occurred on the Exchange, and as so disseminated, distributed and published as aforesaid, as a basis for ascertaining and deciding the market value of said corporate securities, and hence that corporate securities so listed and dealt in on the Exchange thereby became and were more available for use as such collateral security in obtaining loans from National banks and other financial institutions throughout the City of New York and elsewhere, than they would otherwise be" (*Id.*, pp. 16–17).

(*c*) *The information which the appellant gave the subcommittee.*

The appellant voluntarily testified to the following facts:

"That he, the said George G. Henry, was a partner in the firm of William Salomon & Company, engaged in the City of New York in the business of banking; that in the month of September, 1912, the California Petroleum Corporation was incorporated under the laws of the State of Virginia by the firm of Doheny and Canfield, for the purpose of acting as a holding company for the capital stock of two corporations carrying on the business of producing and selling oil in the State of California; that the capital stock of the California Petroleum Corporation was $15,000,000 par value of preferred stock and $17,500,000 par value of common stock, each share of the par value of one hundred dollars. That on, to-wit, September 16, 1912, William Salomon and Company agreed to purchase of Doheny and Canfield $10,000,000 par value of preferred stock, and $7,572,845 par value of the common stock of the California Petroleum Corporation for the sum of $8,215,662. That contemporaneously with the incorporation of the California Petroleum Corporation and the agreement to

purchase stock as aforesaid, William Salomon and Company formed a syndicate composed of themselves, Lewisohn Brothers, Hallgarten and Company, bankers in New York City, and a certain other banking firm in said city (whose name witness did not disclose) for the purpose of participating in the purchase of said stock under said agreement and otherwise dealing therewith as hereafter appears (which said syndicate will hereafter be referred to as the Banking Group). That the unnamed participant in the Banking Group was granted an interest of 12½ per cent. therein and each of the other three participants 29$_{6}^{1}_{8}$ per cent.; that thereupon William Salomon and Company, in behalf of the Banking Group, sold to a syndicate in London, England, $5,000,000, par value, preferred stock, and $2,500,000, par value, common stock, of the California Petroleum Corporation, plus accrued dividends on the preferred stock for the sum of $5,000,000, and thereafter had no interest in the stock thus sold. That at the same time William Salomon and Company formed a syndicate (hereafter referred to as New York Syndicate) composed of one hundred and four participants, including the members of the Banking Group, to which they sold $5,000,000 par value of the preferred stock, and $2,500,000 par value of the common stock of the California Petroleum Corporation, plus accrued dividends on preferred stock, for the sum of $5,000,000, and by the sales to the London and New York Syndicates, as aforesaid, a profit was realized by the Banking Group of $1,784,338 in cash and 25,729 shares of the common stock, being the balance unsold, amounting to the par value of $2,572,846. Among the participants in the New York Syndicate were three corporations; also certain banking firms or institutions, and as to whether these were incorporated institutions George G. Henry was uncertain, two of said banking institutions being located in New York City and the other in another city of the United States. One of the said banking institutions in New York City participated to an amount of $500,000 of the par value of the capital stock. That there were also fifteen individuals participating who were officers of seven national banks (meaning thereby banks organized and doing business under the statutes of the said United States), four of said national banks being located in the City of New York, two in the City of Chicago, Illinois, and one in the City of Detroit, Michigan; also six individuals who were officers of four trust companies, three of which companies were located in the City of New York and one in the City of Chicago; also three individuals who were officers of banks outside of the City of New York. That the total amount of participation by officers of banks was $535,000, the largest single participation being $50,000 granted

to an officer of a national bank located in the City of New York. That there was also a trust company in the City of New York participating to the amount of $50,000, *but that no National Bank participated.* The total amount of participations in the syndicate by banks and banking institutions was $600,000 and the total number of individuals participating who were officers of said banks and institutions, including the national banks, was twenty-four. In some instances, banks as well as officers thereof participated. Altogether participations to the amount of $1,085,000, par value, of the stock were granted to banking institutions and officers of banking institutions. That it was the usual practice of William Salomon and Company to grant participation in like transactions to banks and trust companies, including national banks in the City of New York and elsewhere throughout the United States, and it is not unusual for both the National banks and officers thereof to participate in the same syndicate. That the said George G. Henry did not want to disclose the names of the participants in the New York Syndicate although he understood it to be the wish of the Sub-committee that he should, for the reason that he would consider it dishonorable to reveal the names of his customers unless compelled to do so.

" That the members comprising the New York Syndicate were offered participation by William Salomon and Company by letter, but before acceptances had been received from all of those to whom such participation had been offered, all the stock, to-wit, $5,000,000 par value, preferred, and $2,500,000, par value, of common, were sold by William Salomon and Company in behalf of the New York Syndicate at a profit of nearly $500,000, which sale was completed on the same day that the stock was allotted and sold to the New York Syndicate. Through the sale of the New York Syndicate stock aforesaid, the members of the syndicate, who were officers of banks and to whom participation has been allotted and in some cases before they had accepted the allotment and legally committed themselves, realized a profit from the transaction of about $50,000 and thereby, in effect, received a present of their proportionate share of the profits as aforesaid. That practically all the stock of the New York Syndicate was sold before any acceptance to participate therein had been received by William Salomon & Company, but that the profits realized were nevertheless distributed among those to whom participation had been offered as aforesaid. That the New York Syndicate participants never paid anything for or on account of their participation and never had possession of any of the stock certificates, but the same were held by William Salomon & Company as the syndicate managers, and on the same day said stock

was by them set over to the New York Syndicate, to-wit, October 2, 1912, the transactions were entered on the books of William Salomon & Company by debiting the full amount of stock to the syndicate account and crediting the syndicate account with the various sales, whereupon the stock was delivered to the purchasers, who were customers of William Salomon & Company, and that some of said customers were participants in the New York Syndicate, but none of the bank officers who were participants in the New York Syndicate purchased any of Syndicate stock. They only took their profits from the New York Syndicate, though they had never contributed any money to the New York Syndicate and were not legally committed as participants therein.

"That after the sale of the New York Syndicate stock as aforesaid, and on, to-wit, October 5, 1912, William Salomon & Company * procured the listing of the stock of the California Petroleum Corporation on the New York Stock Exchange; that after the said stock was so listed and until the present (to-wit, January 7, 1913) Lewisohn Brothers conducted on the Exchange a market operation by the purchase and sale of said stock for and on account of the Banking Group (William Salomon & Company, Lewisohn Brothers, Hallgarten & Company and the undisclosed firm who had been granted a participation of 12½ per cent). The aforesaid market operation by Lewisohn Brothers on the Exchange was conducted for the purpose of making a market for the stock of the California Petroleum Corporation by creating a ready demand among the public for the purchase and sale of said stock. For this purpose, Lewisohn Brothers daily engaged on the Exchange in buying and selling the stock, which was done each day by the placing of orders with various brokers (members of the New York Stock Exchange operating on the Exchange), for purchase of the stock at certain prices and for the sale of the stock at certain prices, each of said brokers acting under such orders and so purchasing and selling the stock as aforesaid, being unaware that the other brokers so purchasing and selling the stock were likewise acting by the orders of Lewisohn Brothers as aforesaid. That in the market operation aforesaid, the Banking Group lost money, but this they expected to do in accomplishing their purpose of making

---

* This is not borne out by the testimony before the sub-committee. There the appellant testified that the application for listing was prepared by "the vice-president and the treasurer of the company in conjunction with the statistician of our office, whose help was engaged because he knew the machinery to go through and they did not" (p. 54; see, also, p. 64).

a market for the stock. That although the stock of the New York Syndicate was sold by William Salomon & Company as aforesaid at $40 per share, and the stock of the Banking Group had been sold in part at $40 and in part at $45 per share, the market operations aforesaid on the Exchange were carried on at prices ranging between $62.50 and $70 per share, and rose as high as $72 per share, shortly after operations began on the Exchange in the month of October. During the period the market operations aforesaid, the public (meaning thereby those not concerned in the organization of the California Petroleum Corporation or in the flotation of its stock as hereinbefore set forth) became purchasers of the stock on the Exchange at prices ranging between $50 and $70 per share and that the stock is now, to-wit, January 7, 1913, selling at about $50 per share. That the natural market of the stock of the California Petroleum Corporation would not have been the same without the market operations carried on by Lewisohn Brothers for the Banking Group as aforesaid, but by reason thereof the stock attained a much better and wider market than it would have had without the market operation aforesaid and that there are now (January 7, 1913) nearly two thousand registered stockholders of the California Petroleum Corporation" (*Id.*, pp. 17–21).

(d) The questions which the appellant refused to answer.

The appellant refused to answer certain questions whereby counsel for the Committee sought to elicit (1) the names of the

---

(*) It thus appeared by the appellant's testimony that while there *were no banks at all in the syndicate* (Record, p. 44), it did include the following institutions and individuals participating in amounts as stated:

3 banking institutions (*i. e.*, not banks, but institutions)..... viz.		$600,000.	(Record, 44, 45)
2 in New York) 1.....	$500,000.	$500,000.	" "
1 outside of New York) 1.....	50,000		
	50,000		
24 officers of banks & trust Companies.....		$535,000.	" "
15 officers of 7 national banks, Viz.:			
4 in New York.			" "
2 in Chicago.			
1 in Detroit.			
6 officers of trust companies.			
3 in New York.			" "
1 in Chicago.			
3 officers of State banks outside New York			" "

officers of national banks* who participated in the syndicate operation of the California Petroleum Company, and (2) the name of the fourth partner in the Banking Group, namely, the New York banking firm which he had testified had a 12½ per cent. interest in that syndicate (*Id.*, pp. 21–23).

2. Evidence for the Government.

When brought before the Commissioner the appellant demanded an examination. Before the introduction of any evidence, he moved for a dismissal of the complaint and for his discharge "on the ground that the said Commissioner was without jurisdiction to proceed in the premises, it appearing on the face of the complaint that your petitioner was not thereby charged with any crime or offense against the United States" (Record, p. 2).

This motion having been denied, the Government put the indictment and bench warrant in evidence, and rested, the appellant's identity being conceded.

Counsel for the appellant thereupon again moved for a dismissal of the complaint, and for the appellant's discharge, on the grounds above stated, and upon the further ground that the evidence introduced by the Government had failed to show any offense against the laws of the United States (*Id.*).

3. The Defendant's Evidence.

This motion having been denied, counsel for the appellant introduced in evidence a transcript of the appellant's entire testimony before the committee, and the majority and minority reports of the committee (*Id.*).

From the former it appears that when asked the reason of his refusal to give the name of the fourth member of the Banking Group, he replied: "Because we told them, at the time, that their names would not appear publicly in the transaction. It is a matter of more or less common knowledge, I think, as to who the house was, but their name was not to appear publicly, and I do not feel at liberty to disclose it" (p. 41).

---

* Mr. Henry had already testified that no national banks were in the syndicate (Record, p. 44).

When asked why, if there was nothing dishonorable or improper in national bank officers participating in the syndicate, he hesitated to state their names, the appellant responded : " Because the relations between the banker and his client, while they are not, perhaps, privileged relations, such as those that exist between a lawyer and his client, or the doctor and his patient, are nevertheless confidential, and it is recognized by all honorable and decent business men that they should not tell the names of their customers unless compelled to do so " (*Id.*, p. 49) :

Subsequently the following took place :

" MR. UNTERMYER : The Committee desires to know the names of national banks and officers of national banks who participated in this syndicate operation of the California Petroleum Company ?

" MR. HENRY : Mr. Untermyer, I very greatly regret that I do not feel at liberty to give the Committee that information.

" MR. UNTERMYER : You decline to do so ?

" MR. HENRY : Yes, sir ; I respectfully decline to do so.

" THE CHAIRMAN : I will state as Chairman of the Committee that it becomes my duty to inform you, Mr. Henry, that your declination to answer this question, which the committee considers within its jurisdiction under the resolution referring this inquiry to it, will be reported to the General Committee as a contempt of authority of the House for such action as the entire Committee and the House may see fit to take in the premises if you persist in your declination.

" MR. HENRY : Yes, sir, I realize that, Mr. Chairman.

" THE CHAIRMAN : The Committee does not feel that it is asking any question that it has not the right to ask. It has considered the memorandum in your behalf that has been submitted to it, and feels that it is its duty to propound this question, particularly with relation to national banking institutions and officers taking part in this operation involving securities of corporations doing business between the states.

" MR. HENRY : I understand.

" MR. UNTERMYER : Do you also decline to state the name of the fourth partner in your syndicate ?

" MR. HENRY : Yes.

" MR. UNTERMYER : (continuing) Who had an interest of 12½ per cent. ?

" MR. HENRY : Yes, I do, Mr. Untermyer (*Id.*, pp. 63-4).

He was advised by counsel that there was no legal compulsion to answer the questions and he acted on such advice,

reading to the committee the following paper which had been prepared by his counsel:

"I declined to answer the question* upon the advice of counsel that the committee is without jurisdiction to require the information called for, upon the grounds:

"1. That the subject matter is one in respect to which the Congress is without power to legislate.

"2. That the question is an unlawful intrusion into the private affairs of a citizen under the fourth and fifth amendments of the constitution of the United States.

"3. Generally, that the committee is not lawfully entitled to compel the information called for" (p. 67).

On this the following colloquy ensued (Record, pp. 67-8):

"MR. UNTERMYER: It is your idea, Mr. Henry, that the participation of national banks and officers of national banks in any syndicate operations affecting securities that are listed on the Stock Exchange and carried through the mails and over the telegraphs all over the United States is not a competent subject of Congressional inquiry?

"MR. HENRY: No, sir, I do not think that that** says that; because we have given you, Mr. Untermyer, all the information that it seems to me has any bearing on that point. We have said there were no national banks in; that there were fifteen officers of these national banks in it. We have given you all the information of that kind that it seems to me has any bearing on this thing. I very much hope that the committee will not find it necessary to press that question. It seems to me that I have come down here and given you all the information that I can. I have not kept back a thing and have given the complete story of a very interesting and recent operation on the New York Stock Exchange. I have given our profits. I have given you the terms of our syndicate. I have given you the full machinery of everything in the way the transaction was handled, and I have given you full information as to the composition of the syndicate in so far as the banks, and so on,

---

* This evidently refers to the question calling for the names of the officers of the national banks, etc.

** Referring to the above memorandum.

were in it, and were not in it; and I very much hope you will not find it necessary to press for the names asked for.

"MR. UNTERMYER: Do you not realize, Mr. Henry, that in the absence of the names of the officers of the national banks who have participated in this syndicate, a reflection is left upon other officers of national banks in New York City who may not engage in that sort of enterprise?

"MR. HENRY: I do not.

"MR. UNTERMYER: And that it is only just to them that these names should be given?

"MR. HENRY: I do not know anything about—

"MR. UNTERMYER (continuing): That it is only just that the names should be given of those who had anything to do with that sort of business?

"MR. HENRY: I do not see why there should be any reflection on those who have not gone in, because I do not see any reflection on those who have. * * *

"THE CHAIRMAN: I want to state that the Committee appreciate the fact that you have testified without evasion, and with a desire on your part to furnish such facts as you consider you should furnish, acting under advice of counsel where you have come to a different conclusion, and the Committee also wants to express through its chairman that it considers it the duty of every citizen who believes in organized government, when summoned, to come here and furnish to the committee such information as he may have relating to a governmental inquiry. And the Committee would regret exceedingly that it would have to take action that it has decided to take and submit your name to the full Committee for its determination in turn whether the House should be asked to certify your name to the District Attorney, but the Committee must exercise its power. Power must be lodged somewhere and naturally the witness or his counsel cannot be the judge of that power.

"MR. HENRY: All right, sir.

"MR. UNTERMYER: Why do you not ask the permission of these gentlemen to furnish their names?

"MR. HENRY: Because I do not think it is a proper thing for us to do."

The report of the Committee, after stating that the appel-

lant's contumacy had been certified for prosecution, etc., proceeds:

"Your committee is of the opinion that the information sought from Mr. Henry is germane to the question, whether national bank officers are being influenced by any form of reward to lend the money of their banks on newly-listed and unseasoned stocks? It was impossible for the Committee, without knowing the identity of the banks and officers, to determine whether these participations to officers were given for the purpose of inducing the banks they served to accept these new securities as collateral for loans, or whether they were so accepted" (*Id.*, p. 123).

Mr. Henry was not asked "whether national bank officers are being influenced by any form of reward to lend the money of their banks on newly-listed or unseasoned stocks" or "for the purpose of inducing the banks they served to accept these new securities as collateral for loans or whether they were so accepted." He was given no opportunity to testify as to this suggestion of impropriety in the offer or acceptance of such participations. The committee sought no information on that point.

The majority and minority reports of the Committee which were put in evidence by the appellant, show that the Committee had before it, however, enough to convince it that the prospective profits of such participations *might* constitute a "form of reward" by which national bank officers *might* be influenced in loaning the moneys of their banks; and it certainly needed no proof to enable it to determine that such participations *might* be given to bank officers for the purpose of inducing loans on the new securities, and that they *might* be so accepted.

This appears, conclusively, from the "committee's recommendations * * * for enactment into law" (Section 3, R.; p. 237), viz.:

"R. *Participations by bank officers and directors in underwritings.* Officers and directors of national banks should be prohibited from participating in syndicates, promotions or underwritings of securities in which their banks are or may become interested as underwriters or owners, or as lenders thereon."

And the Committee reported a Bill embodying this recommendation. See draft "Bill to amend the National banking laws" (Section 14; *Id.*, pp. 241-2).

At the close of the examination, counsel for the appellant again moved for a dismissal of the complaint and for the appellant's discharge on the ground that no evidence had been given showing probable cause to believe the appellant to be guilty of any crime or offense against the laws of the United States, and that the Commissioner was therefore without jurisdiction in the premises. This motion was also denied and the Commissioner thereupon issued his commitment (Record, pp. 2, 3).

The Habeas Corpus Proceeding.

The appellant being taken into custody under the commitment sued out a writ of *habeas corpus*, alleging in his petition that his imprisonment, restraint and detention were without authority of law, and that he was deprived of his liberty in violation of his rights, privileges and immunities under the constitution and laws of the United States, for the following reasons (*Id.*, pp. 3-5):

"(*a*) The said Commissioner was without authority, power or jurisdiction under the said Constitution and laws by reason of any of the matters and things contained and set forth in the said complaint, or in the indictment aforesaid, or in either of them, or by reason of anything presented or adduced upon the said examination, to entertain any charge against your petitioner, or to act or proceed in any manner in the premises.

"(*b*) At the time your petitioner * * * refused to answer the questions which are set forth in the said indictment, the said Sub-committee was engaged in no investigation or inquiry, and was conducting no proceeding, upon which your petitioner could be required or compelled, under the Constitution and laws of the United States, to testify or give evidence before the said Sub-committee.

"(*c*) The resolution of the House of Representatives of April 25, 1912, * * * was passed and adopted without and in excess of any power conferred upon the House of Representatives by the Constitution of the United States.

"(*d*) The passage and adoption of the said resolution constituted an encroachment upon the powers confided by the Constitution to the judicial branch of the government; and in conducting the investigation and inquiry thereby directed, the said Sub-committee assumed a power which could only be properly exercised by the judicial branch of the government.

"(*e*) The said resolution * * * in so far as it undertook to require upon (*sic*) your petitioner to answer any of the questions which he refused to answer upon his examination before the said Sub-committee, was passed and adopted without and in excess of any power vested in the House of Representatives by the Constitution, and conferred upon the Sub-committee no power or jurisdiction to require or compel your petitioner to answer any of the said questions.

"(*f*) The matters sought to be elicited by the questions which your petitioner so refused to answer were, and are, your petitioner's personal and private affairs, and are also the personal and private affairs of the said firm of William Salomon and Company; and they are therefore matters into which neither the House of Representatives, nor the said Sub-committee, had, nor can have, under the constitution, any right, power, jurisdiction or authority whatsoever to make inquiry in aid of the legislative function.

"(*g*) The said resolution, in so far as it undertook to authorize the said Sub-committee to inquire of and concerning the names of National Banks, and of and concerning the names of officers of National Banks, who had participated in the said syndicate operations of the California Petroleum Company, was passed and adopted in violation of Title LXII of the Revised Statutes, which provides that no national banking association shall be subject to any visitorial powers other than such as are authorized by that Title, or are vested in the courts of justice, and was, for that further reason, wholly null and void.

"(*h*) None of the questions which your petitioner refused to answer on his examination as a witness before the said sub-committee was pertinent to any matter within the jurisdiction of the House of Representatives which was, at the time, before it for consideration, or proper for its examination, or to any fact bearing thereon.

"(*i*) The said indictment charges no crime or offense against the laws of the United States, and the evidence given before the said Commissioner and upon which he issued the said commitment failed to show probable cause to believe that your petitioner had been guilty of any such crime or offense.

"(*j*) The Congress of the United States is without power, under the Constitution and laws of the United States, to con-

stitute the matters and things specified in the said indictment a crime or offense against the United States.

"(*k*) Your petitioner's refusal to answer the questions did not constitute a crime or offense under any law of the United States.

"(*l*) If Sections 102, 103 and 104 of the Revised Statutes, upon which the said indictment purports to be based, or any other statute of the United States, were intended to make the acts specified in the indictment herein a crime or offense against the United States, and are to be construed as accomplishing that result, the same were enacted without, and in excess of, any power conferred upon the Congress by the constitution of the United States, and are null and of no effect."

The learned District Judge did not think it necessary to pass upon the soundness of any of the constitutional objections. According to his view the question whereby the committee sought to elicit the names of the national bank officers who participated in the syndicate did not invade the constitutional rights of the witness because, in his opinion—

(*a*) Congress had power to ascertain whether a national bank participated directly or indirectly in the organization of the California company, and that such an inquiry was not an exercise of the visitorial powers which Congress has vested in the courts of Justice and in the Comptroller of the Currency; and that in asking the witness the names of the national bank officers the Committee did not encroach upon the domain of visitorial power (p. 340).

(*b*) The fact that the Committee had already heard testimony to the effect that such officers did engage in such participations did not preclude the Committee from obtaining cumulative information upon that point (p. 341).

(*c*) The Committee might have considered it desirable to make the inquiry in numerous instances with a view of ascertaining whether such participations were engaged in frequently, and throughout the country, or only by the same set of officers of the same national banks, or whether such engagements were only occasional; and that as a result of such an inquiry Congress might have drawn conclusions upon which to base legislation (*id.*)

(*d*) Even though the Committee made its recommendation that officers and directors of national banks should be

prohibited from such participations upon the testimony before it, it might "very well have determined to *cite this (and other instances) in support of its conclusions and recommendations*" (*id.*).

He expressed no opinion as to the pertinency of the question which called for the name of the fourth member of the syndicate (*id.*).

Errors Relied Upon.

The order of the District Court overruled all of the objections upon which the appellant, in his petition for the writ of *habeas corpus*, alleged that his imprisonment was without authority of law, and that he was, consequently, deprived of his liberty in violation of his rights, privileges and immunities under the constitution and laws of the United States (*ante*, pp. 19–21).

The errors into which we conceive the learned judge below to have fallen in reaching the conclusion of which we complain consisted:

In discharging the writ and remanding the petitioner; in holding that the petitioner's restraint and detention was not without authority of law, and that the petitioner was not deprived of his liberty in violation of his rights, privileges and immunities under the Constitution and laws of the United States (1st, 2nd and 3d assignments, p. 343); in holding that the Commissioner was not without authority, power or jurisdiction to entertain any charge against the petitioner or to act or proceed in the premises (4th assignment, *id.*); in refusing to hold that at the time the petitioner refused to answer the questions which are set forth in the indictment, the sub-committee was engaged in no investigation or inquiry, and was conducting no proceeding upon which the petitioner could be required or compelled under the Constitution and laws to testify or give evidence before the sub-committee (5th assignment, pp. 343 – 4); in holding that the resolution directing the investigation was not passed and adopted without and in excess of any power conferred upon the House by the Constitution, and that its passage and adoption did not constitute an encroachment upon the powers conferred by the Constitution on the judicial branch of the Government (6th and 7th assignments, *id.*); in holding that in

conducting the investigation the sub-committee did not assume a power which could only be exercised by that branch of the Government (8th assignment, *id.*); in holding that the resolution, in so far as it undertook to require the petitioner to testify beyond what he voluntarily chose to tell, was not passed and adopted without and in excess of any power vested in the House of Representatives by the Constitution (9th assignment, *id.*); in holding that the resolution conferred upon the sub-committee any power or jurisdiction to require or compel the petitioner to answer any of the questions which were propounded to him (10th assignment, *id.*); in holding that the matters sought to be elicited by the questions which the petitioner refused to answer were not the petitioner's personal and private affairs (11th assignment, *id.*); in holding that the matters sought to be so elicited were not matters in respect of which neither the House nor the sub-committee had, nor can have, under the Constitution, any right, power, jurisdiction or authority whatsoever to compel testimony in aid of the legislative function (12th assignment, *id.*); in holding that the resolution, in so far as it undertook to authorize the sub-committee to inquire of and concerning the names of officers of national banks who had participated in the syndicate operations of the California Petroleum Company, was not passed and adopted in violation of Title LXII. of the Revised Statutes and was not for that reason wholly null and void (13th assignment, *id.*); in holding that any of the questions which the petitioner refused to answer was pertinent to any matter within the jurisdiction of the House which was at the time before it for consideration or proper for its examination, or to any fact bearing thereon (14th assignment, pp. 344, 5); in holding that the indictment charged a crime or offense against the laws of the United States, and that the evidence given before the Commissioner showed probable cause to believe that the petitioner had been guilty of any such crime or offense (15th and 16th assignment, p. 345); in holding that Congress had power under the constitution and laws to constitute the matters and things specified in the indictment a crime or offense against the United States (17th assignment, *id.*), and that the petitioner's refusal to answer the questions constituted a crime or offense under any law of the United States (17th and 18th

assignment, *id.*); in construing section 102 of the Revised Statutes as applicable to an inquiry by a sub-committee of a Committee of the House solely in aid of the legislative function (19th assignment, *id.*); in holding that the section in question, as so construed, was a valid and constitutional enactment (20th assignment, *id.*); and was intended to, or does, make the acts specified in the indictment a crime or offense against the United States (21st assignment, *id.*); and in construing section 1014 of the Revised Statutes as authority for the petitioner's removal to the District of Columbia upon the facts disclosed in the petition (22d assignment, *id.*).

PETITIONER IS NOT A WILFULLY RECALCITRANT WITNESS.

It will be observed that the witness is not a wilfully recalcitrant witness. He answered freely without reserve all questions which related to his own business or the business of his firm. He answered questions involving others so far as he could without revealing the private business of his clients. But he refused to answer the questions involving the private affairs of his clients "because (to use Mr. Henry's own language) the relations between a banker and his client, while they are not, perhaps, perfect privileged relations such as those that exist between a lawyer and his client, or the doctor and his patients, are, nevertheless, confidential, and it is recognized by all honorable and decent business men that they should not tell the names of their customers unless compelled to do so"; Record, p. 49). Having been advised by his counsel that he was under no legal compulsion to answer the questions under discussion, Mr. Henry, as an honorable man, could not do otherwise than to refuse to answer them. Unfortunately the law provided no means for judicially determining in advance the propriety of the questions which Mr. Henry refused to answer, so that he had no choice between answering them in face of the advice of his counsel that he was under no compulsion to do so, or refusing to answer the questions, relying upon the advice of his counsel, and incurring the risk of an indictment.

ARGUMENT.

The contention of the Government is that, whenever, in the judgment of the House of Representatives, that body is without adequate information upon which to frame, or intelligently consider, legislative measures which it is within the power of Congress to enact, or (to paraphrase the language of the resolution under which the sub-committee acted in the case at bar), whenever the House deems it advisable to gather the facts bearing on any conditions or charges, or in any way relating to conditions or charges, or to any subjects whatever, as a basis for "remedial or other" legislative purposes (Record, p. 13), the House may institute any investigation that it may conceive to be proper, and that in such investigation it has power to compel any person whom it may choose to call before it, to answer any question that may have a bearing upon any condition, charge or subject which the Committee may have under consideration at the time being.

The contention necessarily takes this extreme form, because such an inquiry is a general one. It is started by the House of its own motion for the purpose of enabling it to exercise successfully its function of legislation; and the power, if it exists at all, must permit of an inquiry into every subject in respect of which Congress can competently legislate.

According to the argument before this Court in *Harriman v. Interstate Commerce Commission*, 211 U. S., 407, the legislation which that Commission might recommend embraced "anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or any of the several states;" and the result of the argument advanced by the Commission was "that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled" (*Id.*, 417).

Mr. Justice HOLMES said:

"If we qualify the statement and say only, legitimately influence the mind of the Commission in the opinion of the

Court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent."

After noting the authority of the Commission to summon witnesses "from any place in the United States at any designated place of hearing," he added (p. 418):

"No such unlimited command over the liberty of all citizens was ever given, so far as we know, in constitutional times, to any commission or court."

And yet, according to the contention of our adversaries, an infinitely greater "command over the liberty of all citizens" was given to Congress by the constitution itself; for if the power asserted by the House of Representatives exists, that body can drag from his home and his business, wherever he may happen to be found within the United States, or in any of its possessions, to Washington, or to any other place where one of its committees may choose to sit, any person who possesses, or is thought to possess, information of any kind, however private or confidential, which the House, or its committee, or a sub-committee, may imagine helpful or convenient in the framing of legislation.

It is scarcely necessary to suggest the wrongs and abuses which might result from the oppressive exercise of such a power in times of popular excitement, or if perverted to the uses of party or faction; especially when, as here, "the method of the investigation has been of an unusual character," and the examination of witnesses has been conducted by a distinguished advocate, pursuant to an "agreement under which no member of the committee has been permitted to interrogate witnesses upon subjects material to the investigation" (Views of Mr. McMorran of the Committee; Record, p. 323).

Our position is, *first*, that even though the language of the statute upon which this prosecution rests were broad enough to cover the case, it should not be so construed, because such was not the intention of Congress, and *second*, that, if so construed, the statute is unconstitutional and void.

If we are wrong in both of these propositions, then we shall argue, *third*, that the appellant was entitled to refuse to answer the questions because they were not "pertinent to the question under inquiry" *(a)* being irrelevant to any matter within their cognizance, and *(b)* because the knowl-

edge sought to be derived concerning the identity of the national bank officers would not have enabled the Committee to examine into the transactions or affairs of the banks.

FIRST. EVEN THOUGH THE LANGUAGE OF THE STATUTE WERE SUSCEPTIBLE OF A CONSTRUCTION BROAD ENOUGH TO COVER THE CASE AT BAR, IT SHOULD NOT BE SO CONSTRUED BECAUSE SUCH A CONSTRUCTION WAS NOT WITHIN THE INTENTION OF CONGRESS.

(*a*)

If we were to assume that the Congress which enacted the law of 1857, which was, as we have seen, the forerunner of sections 102-4 of the Revised Statutes, contemplated its employment as a means of compelling citizens to furnish information in aid of legislation under penalty of imprisonment, we should have to attribute to that body an utter misconception of the representative character of our government.

The American Government was the first

"in which an attempt was to be made on a large scale to rear the fabric of social order on a basis of a written constitution and of a *pure representative principle.* * * * The experiment certainly was entirely new. A popular government of this extent, it was evident, could be framed only by carrying into full effect the principle of *representation or of delegated power;* and the world was to see whether society could, by the strength of this principle, maintain its own peace and good government, carry forward its own great interests, and conduct itself to political renown and glory."*

Webster, Speech on the Character of Washington, February 22, 1832; Works, Vol. I., pp. 222-3.

---

* "In antiquity there were republics and democracies, but there was no representative system. * * * But where the territory was extensive and the population scattered and numerous, there could be no Assembly of the whole body of citizens. To meet this precise difficulty, the representative system was devised. By a machinery so obvious that we are astonished that it was not employed in the ancient commonwealths, the people, though scattered and numerous, are gathered, by their chosen representatives, into a small and deliberate assembly, where without tumult or rashness they may consider and determine all questions which concern them. In every representative body, properly constituted, *the people are practically present.*"

Sumner, "The Representative System and its proper basis." Speeches and Addresses, Boston, 1856, pp. 206-7.

When, by the constitution, the people delegated the legislative power to Congress, the members of the two Houses became the representatives of the people, charged with the duty of enacting proper laws and clothed with all the authority essential for the full performance of that duty.*

"It is a sound and important principle," said Hamilton (Federalist, No. LV.), "that the Representative ought to be acquainted with the interests and circumstances of his constituents." And this is so because under our form of government, the people are the source of all power. Hence, as the people's delegate, the representative is bound to carry out their will.** His duty in that regard was well defined by Clay, who in 1839, in discussing the then much bruited doctrine of "instruction," made these observations in the Senate:

"What is the basis, and what the principle of the doctrine of instruction? Sir, to a certain extent, I have always believed

---

* "I freely acknowledge myself the servant of the people, according to the bond of service—the United States Constitution—and that as such, I am responsible to them."

Letter, Lincoln to James C. Conkling, Aug. 26, 1863: Nicolay & Hay, Vol. IX., p. 97.

** This was the only point in our constitution that could be regarded as purely experimental. In England, where all governmental power is lodged in the Three Estates, the notion that the people should have a voice in the affairs of government never seems to have occurred before the adoption of our constitution. In a speech in the House of Commons (about 1771—the exact date cannot be ascertained), Burke said: "Faithful watchmen we ought to be over the rights and privileges of the people. But our duty, if we are qualified for it as we ought, is to give *them* information, and not to receive it from them; we are not to go to school to them to learn the principles of law and government. In doing so, we should not dutifully serve, but we should basely and scandalously betray the people, who are not capable of this service by nature, nor in any instance called to it by the constitution. I reverentially look up to the opinion of the people, and with an awe that is almost superstitious. I should be ashamed to show my face before them, if I changed my ground as they cried up or cried down men, or things, or opinions; if I wavered and shifted about with every change and joined in it, or opposed, as best answered, any low interest or passion; if I held them up hopes which I knew I never intended, or promised what I well knew I could not perform. Of all these things they are perfect sovereign judges, without appeal; but as to the detail of particular measures, or to any general schemes of policy they have neither enough of speculation in the closet, nor of experience in business to decide upon it." Works of Edmund Burke (London, 1852), Vol. VI., p. 119.

in this doctrine, and have been ever ready to conform to it. But I hold to the doctrine as it stood in 1798; that, in general, on questions of expediency, the representative should conform to his instructions, and so gratify the wishes, and obey the will, of his constituents, though on questions of constitutionality his course might be different; * * * And what is the doctrine of instructions, as it is held by all? Is it not that we are to conform to the wishes of our constituents? Is it not that we are to act, not in our own, but in a delegated character? And will any who stand here, pretend, that whenever they know the wishes or will of those who sent them here, they are not bound to conform to that will entirely? Is it not the doctrine that we are nothing more than the mirror to reflect the will of those who called us to our dignified office?"

Works of Henry Clay: New York, 1897, Vol. VI, pp. 135–6.

That they may possess the qualifications which will enable them to act intelligently and effectually in their character of delegates, Representatives are chosen from those of the general body of citizens who are supposed to be best informed with respect to general conditions and the interests and wishes of their constituents on the various subjects which are within the purview of federal legislation. If at any time they feel embarrassed for lack of knowledge on these points, they may of course proceed in a proper way to the collection of such information as may seem important or useful. Such an investigation does not require the calling of witnesses or the compulsory "discovery" of "testimony." It can be done by private inquiries and research. That it involves the power to forcibly compel the enlightment of the legislative mind and the guidance of its conscience through the instrumentality of an inquisition, to which any and all of the people may be subjected, is not only utterly at variance with the principle of representation, which as Hamilton said (Federalist, No. 62) is the "pivot" on which our government rests, but is abhorrent to all true conceptions of free institutions. The great advantage of a representative legislature is its capacity for the discussion of public affairs.* The theory that the Congress of the United States can make

---

* "For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy."

Montesquieu, Spirit of Law (D'Alembert), Vol. I., p. 177.

use of the power which the people have delegated to it in order to compel the people to aid it, directly or indirectly in the discharge of its functions, is incompatible with the character of Congress as a representative body.

The relation of the American people and their Representatives in Congress is that of principal and agent, and the rules of law which govern that relation as between private parties, apply with equal force to the analogous relation which the people by the constitution created between themselves and their congressional delegates. The latter can no more demand as of right (though it may request and will always receive) the aid and co-operation of the people in the performance of its duties, than the private agent can rightfully call uponh is principal to help him discharge the duties of his agency.

Is it to be imagined that the Congress of 1857 was wholly ignorant or disregardful of these fundamental truths? On the contrary, must it not be assumed that they had them constantly in mind? Let us suppose that when that body had this measure under consideration some member had suggested that a court might interpret the act in conformity with the contention which the Government here advances; would not such a suggestion have been ridiculed?

The fact is that when criticism was made of the general language of the measure, its author thought a sufficient answer was the statement that "The object which this Committee had in view was, where there was corruption in the House of Congress, to reach it" (*Post*, p. 42). This shows the absurdity of the claim that the Congress of 1857 intended to betray its trust, and by employing the power committed to it by the people, establish a new principle of government, violative of the spirit of the Constitution.

(b)

That Congress intended that the act should not apply to inquiries in aid of legislation is implied in the title of the act, which is "An Act more effectually to enforce the attendance of witnesses on the summons of the House and to compel them to discover testimony."

Obviously, the thought expressed in these words reaches only to investigations in respect of which one or the other of

the House of Congress, has judicial functions and is exercising the judicial power of the House, as distinguished from inquiries in aid of legislation.

The words "more effectually to enforce the attendance of witnesses" could scarcely have been used with reference to occasions on which, as everyone knows, there had never been the least difficulty in procuring their attendance. What Congress had in mind was a means of compelling witnesses to do something which they would otherwise be unwilling to do. This is seen in the use of the words "discover testimony." Language could not be found more clearly showing that the purpose was not to coerce mere information, but to extort evidence of wrongdoing from the mouths of reluctant or hostile witnesses—a right to search their consciences, and wring evidence from them against their will.

(c)

A consideration of the act of 1857 as a whole makes it apparent that there was no intention on the part of Congress that it should apply to inquiries in aid of legislation.

(i) Unlike statutes conferring authority to make inquiries in aid of legislation this act does not provide for any judicial review of the pertinency or relevancy of questions before the witness becomes liable to punishment for refusing to answer. In the inquiries conducted by the Interstate Commerce Commission Congress provides the machinery for this judicial determination. Where a witness refuses to answer, application is made to the court for a compulsory order and the witness is enabled to have the court decide the question of pertinency before he need face the danger of a contempt proceeding. This procedure was followed in the Harriman case. The lower court held the question proper and ordered Harriman to answer (*Interstate Commerce Commission v. Harriman*, 157 Fed., 432). Upon appeal this order was reversed (*Harriman v. Interstate Commerce Commission*, 211 U. S., 407).

The same is true of the New York statute governing inquiries by the legislature. If a witness refuses to answer a particular question, application is made to the court for an

order authorizing the imprisonment of the witness until he consents to answer. To issue the order the court must decide that the question is pertinent. The witness may appeal to the highest court, and only upon the final determination of the pertinency of the question against him is he liable to be imprisoned. This was the procedure in the *Matter of Barnes*, 204 N. Y., 108 (*post*, p. 91).

But under the act of January 24, 1857, there is no such provision. It is unthinkable that it would have been omitted if Congress had intended the statute to apply to inquiries in aid of legislation. For then an arbitrary power would result, foreign to every principle of constitutional government and unconscionably oppressive of the citizen. Without any restriction, and subject to no review as to the propriety of its ruling, Congress would be enabled to compel testimony, guided by no standard of pertinency or relevancy, on any subject which might influence its mind on the subject of legislation. Even if we qualify the statement, to paraphrase the language of Mr. Justice HOLMES, and say only, *legitimately* influence the mind of Congress, it will be seen that the power, if it exists, is unparalleled in its vague extent. (*Harriman v. Interstate Commerce Commission*, 200 U. S., 407, 417). The witness would be at the mercy of Congress. This non-judicial body would be the sole arbiter of all judicial questions involving the sacrifice of the citizen's right of privacy or else his very liberty. If the witness, as an honorable man, refuse to betray a business confidence, except under legal compulsion, and he is advised by counsel that the law does not require the sacrifice, he is unable to appeal to the court to protect him in his right or to have the question determined, but forthwith must submit to indictment as a criminal and accept the embarrassment and the financial burden of a criminal prosecution. Surely a construction of the statute which would accomplish this injustice was never within the intent of its framers.

(ii) By the first section of the Act its application is limited to persons who have been summoned, not to furnish information, but "to give testimony or to produce papers upon any matter before either House, or any Committee of either House of Congress"; and it penalizes the refusal to answer only such

questions as are "pertinent to the matter of inquiry in consideration" before the House or Committee by which he shall be examined. How can it be supposed that when Congress used this language it intended it to include general inquiries instituted for the purposes of gathering facts as a basis of legislation? What is the "matter of inquiry in consideration" before a Committee engaged in an educational effort of this character?

In *in re Chapman*, 166 U. S., 661, it was argued that the reference in Section 102 to "*any* matter under inquiry" and "*any* question pertinent to the matter under inquiry" was "fatally defective because too broad and unlimited in extent." But applying the rule that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible avoid an unjust or absurd conclusion, this court construed the word "any" as referring to "matters within the jurisdiction of the two Houses of Congress, before them for consideration, and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon" (p. 667), and held that, so construed, the law was not open to constitutional objections (p. 672).

That inquiries in aid legislation, did not fall within this definition, is quite apparent from this passage in the opinion of Chief Justice FULLER (p. 671):

"The history of Congressional investigations demonstrates the difficulties under which the two Houses have labored, respectively, in compelling *unwilling witnesses* to disclose *facts deemed essential to taking definitive action*, and we quite agree with Chief Justice ALVEY, delivering the opinion of the Court of Appeals, 'that Congress possessed the constitutional power to enact a statute to enforce the attendance of witnesses and to compel them to make disclosure of evidence *to enable the respective bodies to discharge their legitimate functions*'; and that it was to effect this that the Act of 1857 was passed. It was an act necessary and proper for carrying into execution the powers vested in Congress and in each House thereof."

What "definitive action" can be taken by a Committee of Congress engaged in gathering facts? The most it can do is to report the facts with its recommendations, but this is not "definitive" action. It determines nothing. It is in no sense final or conclusive. On the contrary it is the very sort

of action which precludes the idea of definitiveness, being essentially conditional, provisional or interlocutory.

(*iii*) The presence of the word "pertinent" is inconsistent with a purpose of applying the statute to inquiries in aid of legislation. In the conduct of investigations of this character Congressional committees do not hold themselves bound either by the principles of judicial proceedings, or the established rules of judicial evidence, and deem that whatever may influence the minds of the committee in its recommendations to Congress, is a subject into which it may require witnesses to make full disclosure.

In *in re Pacific Railway Commission*, 32 Fed. Rep., 241, to which we later refer at length (*post*, pp. 65, *et seq.*), Mr. Justice FIELD observed that it was unnecessary to consider whether the interrogatories were proper in themselves. He said (p. 259):

> "It is enough that the federal courts cannot be made the instruments to aid the commisioners in their investigations. It also renders it unnecessary to make any comment upon the extraordinary position taken by them according to the statement of the respondent, to which we have referred, that they did not regard themselves bound in their examination by the ordinary rules of evidence, but would receive hearsay and *ex parte* statements, surmises and information of every character that might be called to their attention. It cannot be that the courts of the United States can be used in furtherance of investigations in which all rules of evidence may be thus disregarded."

(*iv*) Nothing affords a more apt illustration of the matters into which Congress sought adequate power of full and effectual inquiry than the presence of the second, or immunity, section. Statutory provisions of this character "have been for two centuries the expedients resorted to for the investigation of offenses whose proof and punishment were otherwise practically impossible, because of the criminal implication in the offense itself of all who could bear useful testimony."

Wigmore, vol. III., Sec. 2281 (p. 3166).

The obvious purpose of the section, like that of the immunity clause of the Anti Trust Law, was "to make evidence available and compulsory that otherwise could not be got".

Heike v. United States, 227 U. S., 131, 142.

Legislation of this sort is defended upon the theory that the people will benefit more, in certain emergencies, by an ability to compel testimony which would otherwise be protected from disclosure by the constitution, than they will lose in the escape of individual criminals from punishment. An investigation by either House of Congress into the conduct of its members, was, in the view of the Congress of 1857, such an occasion, the disadvantages of condoning the offense being supposed to be more than overcome by the resulting ability to extort evidence without which it would have been unable to determine the truth or falsity of charges affecting the integrity of the House. It might be reasonably argued that without such a law Congress would be impotent when it needed power most. But no one can seriously assert that information wrung from criminals in the course of a proceeding unfriendly and inquistorial can ever be so valuable an aid to the exercise of the legislative function as to warrant a grant of immunity such as that which the Congress of 1857 extended to witnesses.

(*v*) Another singular circumstance throwing light upon the intent of Congress, is found in the third section of the Act, providing for the certification of the facts to the District Attorney of the District of Columbia.

Why did not Congress, knowing that Committees of either House have power to conduct their hearings wherever they see fit, make provision for the presentation of cases of contumacy occurring elsewhere than at the seat of government? It certainly knew that the criminal courts of the District of Columbia could not take cognizance of the case of a witness who refused to testify when in attendance before a Committee sitting at Boston or San Francisco. And it would have been very easy to provide that the speaker should certify the facts "to the district attorney for the district having jurisdiction of the offense". The absence of a provision of this sort can readily be explained. Committees engaged in inquiries looking to "definitive action", unlike those gathering facts for the enlightenment of Congress, hold their sessions, as a matter of course, in the Capitol at Washington. When, therefore, Congress limited the place of prosecution to the District of Columbia, it is clear that it intended that the statute should apply only to those investigations which the established

practice and the rules of orderly procedure required to be conducted at the national capital.

Quite differently did Congress provide when it passed the Act of February 19, 1851 (Chap. 11, 9 Stat. L., 569, Sec. 5), for the compulsion of testimony in contested election cases. As these inquiries are apt to be conducted anywhere in the United States the statute provides for the prosecution of a recusant witness wherever his contumacy occurs.

Again, when the Act of 1857 was debated, Congress had already passed the Act of February 19, 1851, providing for the compulsion of testimony of witnesses in contested election cases and punishing recalcitrant witnesses for contempt. Although the power to try contested election cases is included in the express grant of powers of the Constitution equally with the power of punishing members for disorderly behavior, Congress deliberately chose to cover each particular situation by the respective statutes. The statutes were intended only for the particular cases; and it was never dreamed that the Act of 1857 would be employed to coerce testimony where there was no charge of disorderly behavior of members or of corruption of Congress, but where eleven members of one of the Houses of Congress were, as Burke aptly expressed it (*ante*, p. 28, *note*), " going to school " to their constituents.

(*d*)

A consideration of the evil which the Act of 1857 was designed to remedy, of the circumstances surrounding the enactment, and the situation as it then existed and as it was pressed upon the attention of Congress, make it impossible to suppose that the Act was intended to apply to inquiries other than those which called for the exercise of the judicial power of Congress.

If the purpose and intent which led to the enactment of the Act of 1857 can be discovered and made plain, "it must clearly result, as that act was but the precursor" of section 102, that "the light generated by the original intent and purpose will afford an efficacious means for discerning the intent and purpose" of section 102.

United States v. Press Publishing Co., 219 U. S., 1, 11–12.

The situation which called for the Act of 1857 and the circumstances attending its enactment were briefly but accurately stated by the Senate Committee on the Judiciary in 1876 when, in reporting adversely two bills which had passed the House, by which it was proposed to substantially re-enact the immunity provision of the Act of 1857 (which had been repealed in 1862, *ante*, p. 3), the Committee said :

" In January, 1857, one Simonton, a newspaper correspondent, having published a statement that members of the House of Representatives had sold or offered to sell their votes on pending measures, was brought before a committee of the House as a witness on the subject. He, stating that members had offered to sell their votes through him, refused to disclose the names of such members, on the alleged ground that it would be a breach of honorable confidence to do so. He was committed to prison for the refusal, and an act, *born of the emergency*, and doubtless believed to be just and efficacious, was passed through both Houses with great celerity, if not *with excessive haste*,* providing for compulsory incriminating testimony, and for the pardon and indemnity of any witness who should testify before either House or its committees for any crime concerning which he should be examined. The bill was treated on all hands as one of legislative pardon, and its scope was described as ' intended to grant a parliamentary

---

* In the course of the debate on the Bill Mr. Burnett said :

" The accused is in the power of the House and in the custody of the Sergeant at Arms. If he refuses to answer where is your power to punish him for it? Will you send him to jail? (Many cries of ' yes '.) Where is the law for it? Where is your power to deprive even the humblest citizen of his liberty? * * * The courts in the different states all exercise the power to punish contempts. Is it done without authority of law? Is it a power incident to their organization, or is it only exercised in accordance with law? If gentlemen will look to the different states they will find that this power is exercised either by express statute or in accordance with the common law, and never otherwise. The legislatures of the several states may exercise this power unless expressly deprived of the right by the organic laws of the state, for they can exercise all the powers of government not forbidden. But, Sir, how is it with us? We can only exercise such powers as are expressly granted or incident to those expressly granted. When we examine the question of the privileges of this House, we must first look to the Constitution, and we there find that the express grants of privileges are very few. What are they? Exemption from personal arrest; exemption from question elsewhere for what is said in the House, and power over our members and proceedings. For the exercise of these powers no statue is necessary, the Constitution being the law. But, Sir, there is another power conferred, and if it had been exercised we would have no difficulty in this case. We have the power to make all laws necessary and proper for carrying into execution the powers vested in us by the Constitution. This power, with the express grants enumerated, confers upon Congress full power to pass a law punishing a witness for contempt. Congress has failed to exercise this power and we are now called upon to deprive a citizen of his liberty in the absence of any express law warranting it." (Congressional Globe, Part 1, 1856, 1857, 34 Congress, 3d Session, pp. 407, 408).

pardon beforehand to every witness who, on the summons of the House or a committee, should appear before them and testify to any acts of which he may have been guilty ' (Globe, 3d Sess. 34th Cong., p. 427).

" A small number of members of the House, not thrown off their balance by indignation at such charges, and not fearing popular clamor, pointed out the dangers of such legislation, but the House refused to refer the bill to the Judiciary Committee for consideration, and, under an excitement well illustrating the great danger of investing any part of the pardoning power in large assemblies, at once passed the bill.

" In the Senate very little time was taken for consideration. The bill was received during the discussion of a telegraph question, referred to the Judiciary Committee, reported within half an hour, and was passed the next day."

Smith's Digest of Decisions and Precedents (Senate Doc. No. 278, 53d Cong., 2d Sess.), p. 564.

The Select Committee before which Simonton refused to give testimony was appointed pursuant to the following resolution :

" Whereas certain statements have been made charging that members of this House have entered into corrupt combinations for the purpose of passing and preventing the passage of certain measures during the present Congress ; and

" Whereas, a member of this House has stated that the article referred to is not wanting in truth ; therefore,

" Resolved that a Committee, consisting of five members, be appointed by the Speaker, with power to send for persons and papers to investigate said charges ; and that said Committee report the evidence taken, and what action, in their judgment, is necessary on the part of the House, without any unnecessary delay."

Cong. Globe, 34th Cong. 3d Sess., pp. 275, 302.

One of the questions which Simonton refused to answer was the following : " You state that certain members have approached you and have desired to know if they could not through you procure money for their votes upon certain bills ; will you state who these members were ? "

In response to other questions of similar import he said : " Two have made them direct, others have indicated to me a desire to talk with me with these subjects, and I have warded it off, not giving them an opportunity to make an explicit proposition."

To the question: "What do I understand you to mean when you say these communications were made direct?" Simonton answered: "I mean that after having obtained my promise of secrecy in regard to them they have said to me that certain measures pending before Congress ought to pay; that the parties interested in them had the means to pay; that they individually needed money, and desired me specifically to arrange the matter in such way that if the measures passed they should receive pecuniary consideration."

Id., p. 403.

The bill which resulted in the passage of the Act was introduced by the Select Committee on January 21, 1857, and accompanied a report in which, after setting forth Simonton's contumacy, the Committee said:

"It is due to the dignity and reputation of the American Congress to purge itself of such unworthy members if they have thus shamelessly prostituted their high and honorable positions to such base purposes. The country has the right to know who have betrayed the trusts confided to them by their constituents. The honest men of the House should aid, by the exercise of all the powers with which they are vested, to secure the names of the supposed guilty parties, and thereby shield the general reputation of the body as well as their own characters from unjust and improper interpretations and suspicion" (*Id.*).

Reference to the report is justified (*Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S., 320, 333; *Northern Pacific Co. v. Washington*, 222 U. S., 370, 380; *McLean v. United States*, 226 U. S., 374, 380), and gives support to our contention.

The first and second sections of the Bill as introduced were substantially the same as those enacted. These sections, with slight verbal modifications, and the third section, were embodied in a substitute measure which was introduced by James L. Orr, the Chairman of the Committee,* the following day.

The Committee concurred unanimously in the opinion that the House was clothed with full power to punish Simonton for contempt; and by a resolution of the House, which was

---

*Speaker of the succeeding Congress and subsequently Governor of South Carolina.

adopted by a vote of 164 to 16, he was taken into custody and subsequently committed to jail.

Although the meaning of a statute cannot be determined from statements made in debate (*United States v. Trans-Missouri Freight Association*, 166 U. S., 290, 318; *Omaha Street Ry. v. Interstate Commerce Commission*, 230 U. S., 324, 333), "that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

Standard Oil Co. v. United States, 221 U. S., 1, 50.

It appears from the debates on the bill that a small minority did not believe that the House possessed the power to commit "without the passage of a law or the adoption of a rule on the subject." In view of this, Howell Cobb of Georgia said he thought the matter should be placed beyond question.

The Speaker having suggested a doubt whether the bill ought not to be confined to the specific case before the House, Mr. Orr answered (pp. 405-6):

"In reply to the suggestion of the chair I have to say that the Committee may not be able to proceed in their investigation so as to report the facts to the House unless such a bill is passed to give us authority to bring witnesses before us and to inflict a greater punishment than the Committee believe the House possesses the power to inflict. Some gentlemen say that the very fact of presenting this bill is an admission that the House has no power upon this subject, and that it negatives the resolution which we have already adopted. No such thing. The power of the House I believe it is conceded by all, in reference to the punishment which it can impose for a breach of its privilege or for contempt, terminates with the adjournment of Congress. It terminates upon the 4th of March; and the Committee are satisfied that if the House exercise all the power which the majority on this floor claim that it can exercise, that will be insufficient to extort testimony from unwilling witnesses. That is the position in which we are placed, and that is the reason for the necessity of this special report from the Select Committee.

* * * * * * *

"The object of the bill reported by the Committee is to give additional authority, and to impose additional penalties on a witness who fails to appear before an investigating Committee of either House of Congress, or, who, appearing, fails to answer any question. Now, sir, I do not propose to state what has transpired in Committee; but I can suppose a case,

and that is this, that when a witness is brought to a particular point—to material facts within his knowledge, with reference to the combinations which we are charged to examine into, he folds his arms and says to the Committee: 'I decline to answer that question because it will criminate myself.' Well, sir, that would, in the opinion of the Committee, be a sufficient reason why the witness should not be called upon to answer the question. Now, sir, I submit that it would be the result of the merest accident in the world if we should ever find a single witness who could testify to a single fact of an improper influence brought to bear on members of Congress without, in that testimony, implicating himself."

Speaking of the inadequacy of the punishment which the House itself might inflict on a recusant witness, he said (pp. 405–406):

"The House considers that the excuse which he tenders for his contumacy is insufficient, and the House orders him into the custody of the Sergeant-at-Arms. Until when? Your power to punish for any contempt committed against the authority of the body of which you are members, expires unquestionably when the commission of the members constituting that body expires. * * * I believe that no one has ever held that the House has authority to go beyond the limitation of the term for which the members are elected in punishing witnesses for contempt of the authority of the House. Is that punishment adequate? What would be the term of the imprisonment? Take the case we have had before this House, and the imprisonment under its order could not be more than five weeks. * * * I do not know but what the parties supposed to be implicated by this witness may be able to relieve themselves from all suspicion. But suppose they are not—suppose they are involved to the extent of hundreds and thousands of dollars; how much, then, might they afford to pay to a defaulting or recusant witness in consideration that he would undergo this punishment? The necessity of it is illustrated by another case which I may suppose. Suppose that two days before the adjournment of this Congress there is a gross attempt on the privileges of the House by corrupt means of any description: then the power of this House to punish extends only to those two days. Is that an adequate punishment? Ought we not then to pass at once a law which will make the authority of the House respected, and in addition to that, after this bill has passed, this House will turn these matters over to the courts—the tribunals which have the time, education and facilities for investigating such charges? This House cannot undertake to constitute itself a court to determine all these things because it would

consume too much of its time. Our entire session might be exhausted by them if there were a series of contempts. * * * The House ought to lend every aid in its power to any committee to ferret out and smoke out any such corruptions as are charged. * * * His statement is that two members of this House made direct propositions to him to secure money for their votes to pass certain bills pending before Congress. He makes the charge explicitly and distinctly. * * * I want power from this House to extract the facts from that witness."

Henry Winter Davis, of Maryland (also of the Committee), said (p. 407):

"Do gentlemen tell me that a year's confinement in the penitentiary and a fine of less than $1,000 is a punishment inside of the enormity of the offense of a witness refusing to answer a question which he already states he can answer, touching the purity, the honor, the dignity—aye, sir, the honesty of this House, in reference to a charge which discredits every member of this House, and which tends to break down the moral authority of the law of the House? * * * This is a matter which touches the very dignity and, ere many years, will touch the very existence of the Republic."

Speaking of the purpose of the second (immunity) section, Mr. Davis said (p. 427):

"It is to remove the obstacle to the *investigation of parliamentary corruption* by offering in this solemn way to the party beforehand, on his being summoned in order to give testimony, a parliamentary pardon for every criminal act that he may disclose himself to have been guilty of."

It was Humphrey Marshall of Kentucky who moved to commit the bill to the Committee on the Judiciary. He thought its language was entirely too broad, and that under it a manufacture called before a committee having a tariff measure under consideration, who refused to testify as to the manner in which certain colors were produced might be put in the penitentiary (*Id.*, pp. 429–30). George G. Dunn, of Indiana, was, however, the only other member of the House who expressed any similar concern (*Id.*, p. 431). In answer to these criticisms, Mr. Orr indignantly protested:

"The object which this Committee had in view was, *where there was corruption in either House of Congress to reach it.*"

Later he said that the committee was

"better prepared to report a bill on this subject than any other in the House * * * because they have been tracking up this matter for the last ten or twelve days, and they know *what legislation is necessary to extort that which they know is material to the vindication of the integrity and reputation of this body*" (*Id.*, 432).

Further:

"The great object intended to be accomplished by this bill is *to enable the House to purge itself;* and it is more important that the House should purge itself than that an individual should be convicted before a criminal court. * * * When an investigation is instituted to see whether bribery and corruption and other improper influences have been resorted to to influence members of Congress, we desire to be able to get that information before us which will enable the House to purge itself of a corrupt member. For, Sir, I imagine the law itself would be of little moment or little avail if the great source and fountain of all law was corrupted. It is important, therefore, in that aspect of the case, that the bill should pass so that we may compel disclosure" (*Id.*).

The motion to refer to the Committee on the Judiciary was defeated by the vote of 132 to 71, and the Bill passed the House by the vote of *182 to 12*. It was immediately sent to the Senate, where it was debated, and passed by the vote of 46 to 3 the following day, January 23. It was approved by President Pierce on January 24, 1857.

The following passages are taken from the Senate debate:

"When the Committee came to make this witness testify, he replied 'You have no power, or if you have, I will disobey your authority.' In such a case some say there is no punishment; others hold that you may punish; but at all events the punishment is inadequate. And they say, it being our duty and our clear right, under the statute which we passed ourselves, *to punish our own members for corruption*, we will seek the ordinary modes which are necessary in the exercise of that power to ascertain the truth of the allegation. *That is all this bill seeks to do*" (Robert Toombs of Georgia, *Id.*, p. 436).

"It is levelled at any man, and every man who, being cognizant of any *corruptions* on the part of any member of Congress on any subject into which Congress pleases to inquire, shall refuse to give testimony before a committee *in order that the guilty party may be brought forth and sentenced*" (James A. Bayard of Delaware, *Id.*, p. 438).

"Without some law of this kind we have found all previous efforts of inquiry futile. Now the charge is brought home so as to shock the sense of Congress—brought home by a witness who deliberately tells them 'I have been offered a *bribe by two members of your body*, but it is against my honor to disclose the names of those men who have asked me to do an act disgraceful to myself as well as to them! * * * I therefore hold, sir, that in the particular case which has given origin to this bill, and has brought it specifically before the people as well as before Congress, action becomes necessary. In order to render that action effectual a bill of this sort, though it may contain provisions which I would wish differently molded, is primarily necessary to be passed" (*Id.*, p. 439).

William H. Seward of New York called attention to the absence of any specification of the subject which Congress might be investigating saying:

"It might be foreign from all the provisions of the Constitution; it may be a local question; it may be a personal question; it is not necessarily a public question. To be sure, I shall be answered that great legislative bodies will not institute inquiries into matters which are foreign from their jurisdiction. That may be so, generally, but it is not always true" (*Id.*).

To which Senator Bayard responded:

"It is a rule of law very well settled that if there is no jurisdiction over the subject matter, the proceeding is void. In such a case, of course, a court of justice would decide that the witness could not be compelled to answer for want of jurisdiction" (*Id.*).

What Senator Seward was really concerned about was, not that the courts would not limit the scope of the act to the subjects to which Congress intended it to apply, but that Congress might predicate upon its broad and sweeping language an undue extension of its powers. He did not think reliance could be placed on the expectation that legislatures would not transcend their jurisdiction. The history of such bodies showed, he said, that constituted as they were, especially in a republican or free country, there was a tendency at times to "high political excitement." Legislative usurpations such as had taken place in France and England might not happen here. Nevertheless, since the bill, if it was to become a law, might stand for a thousand years, he thought it ought to be made right. He therefore proposed to insert

after the word "inquiry" the words "within the constitutional jurisdiction of Congress, or of either House of Congress" (*Id.*).

Senator Bayard answered:

"I am aware that legislative bodies have transcended their powers—that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of co-ordinate branches of the Government; but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as well as the offense resting in the breast of either House), from Congress to the Courts of Justice. When a case of this kind comes before a court will not the first inquiry be, have Congress jurisdiction of the subject matter?—has the House which undertakes to inquire jurisdiction of the subject? If they have not, the whole proceedings are *coram non judice* and void. The Court would quash the indictment if this fact appeared upon its face, and if it appeared on the trial they would direct the jury to acquit" (*Id.*, p. 440).*

Senator Toombs was of the same opinion. He said:

"If either House should attempt to take up a subject over which they had no power, no bill passed by Congress could give them authority, nor could it diminish any power given them by the Constitution" (*Id.*).

Speaking of the occasion which called for the enactment of the measure, Senator Toombs had previously said (*Id.*):

"Sir, you cannot get from me a vote of condemnation for the most miserable wretch that may hang around the purlieus of the capitol until you have a law defining the act which he has done to be criminal. I would not be criminal or base enough to vote to punish a man against law under any of your pretended privileges of Parliament. No matter what his act may be, I would not vote to punish him under any indefinite idea of privilege. We must have a law and then I will put him under the operation of the law. *This law will punish the people whom it is intended to reach.* If you defeat this bill, you have no law on the subject and then, of course, the worst

---

*The word "any" as used in section 102 of the Revised Statutes "refers to matters within the jurisdiction of the two houses of Congress, before them for consideration and proper for their action; to questions pertinent thereto; and to facts or papers bearing thereon." *In Re Chapman*, 166 U. S., 661, 667.

criminals may come here and no matter what may be their offenses against the Body, those who hold my notions cannot consent to punish them under any vague notions of privilege."

Senator Bayard added:

"The evils of which we have heard as existing by rumor for several years have now assumed distinctive authority, and the desire is to ascertain if they exist. * * * This bill does nothing by way of extending the powers of either House; but it transfers to the judiciary of the country, the appropriate tribunal which is untouched by political passions, the control of the witness, and gives them cognizance of the facts necessary to establish the guilt of the witness who refuses to answer. * * * Under these circumstances, I can see no reason why the bill should not be sustained by the Senate in order that, if the corruption which has been alleged for years as existing in Congress, and of which we have now specific charges, does exist, the country may know who are the individuals upon whom to fix it, and that they may be held up to the scorn of their constituents, and the condemnation of the whole country" (*Id.*, pp. 444–5).

It will thus be seen that while the generality of the phraseology was made the subject of comment in both Houses of Congress, no apprehension was felt on that score, Congress having full confidence that the courts when called upon would limit and confine its broad language to the particular class of investigations which it was intended to cover, and would not extend it to those which were not within that intent.

(e)

So far as we are informed, Congress has never before attempted to convert this statute into an authority for the prosecution of a witness refusing to testify in the course of an inquiry in aid of legislation.

The circumstances of the *Simonton* case (*supra*, pp. 37, *et seq.*) show why the Act was passed.

Since its enactment it has been made the basis of prosecution in only three cases. Two of them (*Wolcott* and *Chapman*) were precisely like the *Simonton* case. In the third (*United States v. Kilbourn*, *post*, p. 49) the prosecution was abandoned when this court held, in *Kilbourn v. Thompson*, *post*, p. 55, that the committee was without jurisdiction.

The Wolcott Case.

The first case arising under the Act was that of John W. Wolcott, which arose in 1858. Charges had appeared in the public press that the firm of Lawrence Stone & Company of Boston had expended $87,000 in order to procure the passage of the Tariff Act of 1857, and declared that the votes of members were bought to procure the legislation. The House raised a Select Committee to investigate these charges, and directed it to ascertain whether "any member, officer or employee of the then or present House were in any way connected with the receipt or disbursement of said sum of money," etc. (Smith's Digest of Decisions and Precedents, Senate Doc. No. 278, 53d Cong., 2nd Sess., p. 201.) The testimony showed that of the $87,000 charged upon the books of Lawrence Stone & Company as having been expended to procure tariff legislation, $58,000 had gone into the agent Wolcott's hands. He was asked whether he received this sum. He refused to answer except to state that he did not receive any sum for the purpose of influencing the action of Congress. On February 11, 1858, Mr. Stanton (Ohio), on behalf of the Committee reported Wolcott's refusal to testify and offered a resolution that the Speaker issue a warrant to the Sergeant at Arms to arrest Wolcott and bring him to the bar of the House, to answer for his contempt. In support of the resolution, Mr. Stanton stated that the books of the Company showed this large sum to have been placed in Wolcott's hands and was charged to the account of Procuring the Passage of the Tariff Act. The Committee demanded to know of the witness his use of the fund. The Committee contended that it was not to be foreclosed from inquiry by Wolcott's mere conclusion that he received no money for the purpose of influencing Congress. During the discussion in the House, reference was made to the Act of January 24, 1857, which was passed in the then last session. The witness, with the assistance of his counsel, Reverdy Johnson, resisted the examination by the Committee. He was not without his defenders among members, who differed with the supporters of the resolution and contended that his denial of the receipt and use of money for improper purposes ousted the Committee of further jurisdiction; that an inquiry into how he used his funds for any purpose would unwarrantably invade his private affairs. The

Sergeant at Arms arrested Wolcott and brought him to the bar of the House. He persisted in his refusal to answer. His excuse was deemed insufficient. In moving to proceed against him, Mr. Stanton stated (p. 259) that one of the few *quasi* judicial powers of the House was the right to judge of the election returns and qualifications of its members, to punish them for disorderly behavior and, with the concurrence of two-thirds, to expel them. The House had the power to defend itself against defamation.

"A legislative body," said he, "without the power to purge itself by the expulsion of a member for bribery would be an object of scorn and contempt. It is a power that has been exercised a thousand times in the English Parliament, by this House, by the legislatures of the various states of the Union, and has never been denied by any judicial tribunal or legislative body. The power to investigate and to try a member is merely the exercise of the power to punish or expel" (p. 261). * * * *The case of Simonton at the last session was precisely like this*" (p. 362).

On February 15, 1858, Walcott was committed to the common jail by order of the House. On March 4, 1858, he was indicted by the Grand Jury of the United States for the District of Columbia under the Act of January 24, 1857, for refusing to answer a question as to his receipt from Lawrence Stone & Company of $30,000, more or less. It does not appear from the records that his case was certified by the Speaker to the United States Attorney, as provided by the Act, but on March 22, 1858, Mr. Stephens, of Georgia, offered a resolution which in the preamble states that the Speaker did certify the contumacy of the witness to the District Attorney under the statute, and laid the case before the Grand Jury, resulting in the indictment and the delivery of Wolcott over to the marshal of the District of Columbia. Wolcott was admitted to bail and returned to Boston. The records of the Supreme Court of the District of Columbia show that he submitted an affidavit on April 17, 1858, of his inability to go to trial at that time, owing to illness in his family, and that on March 17, 1859, a *nolle prosequi* was entered by the United States Attorney upon the payment of $1,000 and costs by his surety. (U. S. v. Wolcott, Criminal Docket, 1859, Supreme Court of the District of Columbia. Smith's Digest of Decisions and Precedents; Sen. Doc. 278, 53rd Congress, 2nd Session, p. 201.)

United States v. Kilbourn.

The next case in which an indictment was found under this statute was that of Hallet Kilbourn. At present only brief mention need be made of this case. We treat of it at length later on (*Post*, pp. 55, *et seq.*). Kilbourn, a real estate dealer in the District of Columbia, was summed before a Committee of Congress known as the "Real Estate and Jay Cooke Indebtedness Committee." This committee was appointed pursuant to resolution of January 24, 1876 (1st Session, 44th Congress) which recited that through the Secretary of the Navy the Government had made deposits with the banking house of Jay Cooke & Company of its public funds; that Jay Cooke & Company were bankrupt and their affairs were being administered in the District Court for the Eastern District of Pennsylvania; that the Bankrupts were alleged to have a large interest in "the Real Estate Pool"; that the Trustee of the bankrupt estate had recently made a settlement of this interest to the loss of the creditors, including the United States, and that as the courts are now powerless to afford adequate redress, it was resolved that the Committee inquire into the nature and history of the said Real Estate Pool, the character of said settlements, the amount of property in which Jay Cooke & Company were interested, etc., and with power to send for persons and papers and to report to the House (Senate Misc. Documents, Second Session, 53d Congress; Digest of Decisions and Precedents, 536). Kilbourn was asked among other things *to disclose the names and residences of the members of his pool*, which he declined to do. He was brought to the bar of the House and upon the Speaker's warrant, the Sergeant of Arms committed him to the common jail of the District of Columbia. On March 27, 1876, he was indicted by the Grand Jury of the District of Columbia for refusing to answer the questions and produce the books before the Committee under the Act of January 24, 1857, as amended, and as carried into the Revised Statutes in 1874, in its present form, as Sections 102, 103, 104, R. S. U. S. It does not appear from the records that the Speaker certified his alleged contumacy to the District Attorney.

Kilbourn sued out a writ of *habeas corpus* in the Supreme Court of the District of Columbia, but it is stated in the opinion of Chief Justice CARTTER, of that court (Matter of Kilbourn's petition for a writ of *habeas corpus*; No. 11314,

Criminal Docket, Supreme Court, District of Columbia) that the Speaker did certify the alleged offense of Kilbourn to the District Attorney under the statute; and the District Attorney having presented the matter to the Grand Jury, the indictment followed. The court ordered the writ to issue, discharging Kilbourn from his confinement in the jail upon the ground that as he was now indicted, he was entitled to bail pending trial. The court held that the certification of the alleged contumacy by the speaker to the United States Attorney transferred the case to the courts, and the power of the House to punish for contempt expired and the punishment prescribed by law supervened. The court did not go into the merits of the case or consider the jurisdiction of the House to institute the investigation.

The case reached this court upon Kilbourn's action for false imprisonment against Thompson, the Sergeant at Arms of the House of Representatives and certain members of the House. *Kilbourn v. Thomson*, 103 U. S., 168. It being decided that the House had no jurisdiction to conduct the inquiry the indictment was not pressed and the matter ended. (*U. S. v. Kilbourn*, 11,314 Criminal Docket, Supreme Court of the District of Columbia. Smith's Digest of Decisions and Precedents; Sen. Doc. 258, 53rd Congress, 2nd Session, 547, 552.

United States vs. Chapman.

The next and best known case under the statute is that of Elverton R. Chapman, which arose in 1894, and in which case this court has construed the Act. There had been charged publicly in the press that there was corruption in the Senate in connection with the passage of the sugar schedule in the Wilson tariff bill. Allegations were made that senators were being influenced in their votes by reason of their speculation in sugar stocks. Chapman, a New York stock broker, confessedly dealing in the stocks of the American Sugar Refining Company, was asked by the Committee raised to investigate the charges, whether any senator has been or is speculating in what is known as "sugar stocks" during the consideration of the tariff bill now before the House. He stood mute and refused to answer either yes or no. His contumacy was certified to the United States Attorney for the District of Columbia and his indictment followed. His conviction was affirmed by this court. (*In re Chapman*, 166 U. S.,

667 1896). The court pointed out that the Senate was engaged in an inquiry into the conduct of its members; that this was one of the few *quasi* judicial powers confided to either House of Congress, and that in the conduct of such an inquiry they had the right to compel *testimony if pertinent*. Chapman admitted that he dealt in these stocks, and it is manifest that the question whether he had bought or sold any for any senator was directly pertinent to the matter under inquiry by the Senate.

SECOND. IF SECTION 102 OF THE REVISED STATUTES IS TO BE SO CONSTRUED AS TO MAKE IT APPLICABLE TO INQUIRIES IN AID OF LEGISLATION, IT IS UNCONSTITUTIONAL.

It is inconceivable that the statute was intended, or could be made to apply to officers of the executive or judicial branches of the government. The former have always asserted, without effective challenge, the right to decide for themselves, independently of all other authority, what information coming to them in their official capacity the public interests permits to be communicated, and to whom; and if the judges of the courts of the United States cannot be required to give opinions in the nature of advice concerning legislative action (*Muskrat v. United States*, 219 U. S., 346) they certainly cannot be called upon to furnish, in their judicial capacity, information for that purpose. The statute then, applying only to the people at large, that is, private citizens who hold no office under the government, the inquiry is whether the people who have *delegated* the legislative power to Congress, and imposed upon that body the duty of making laws, can be compelled, under pain of fine and imprisonment to assist Congress in the discharge of those duties. We submit that Congress can no more demand this service from the people than the executive or judicial departments of the Government can call for a similar sacrifice to enable them to perform *their* respective functions.

Any other view would lead to the most preposterous results. If Congress has power under the Constitution to pass laws compelling the people at large to aid the discharge of the functions and duties which it has delegated to that body, the power is certainly not limited to mere information. It must follow that either House can with equal validity demand

their counsel and advice whenever they may feel the need of it. And, according to the the same notion, it may require the mass of the people to aid the executive and judicial departments to the same extent, whenever those branches of the Government may feel themselves in need of information or guidance in the execution of their functions, and that it can punish all those who fail to respect such demands.

It would be easy to put striking examples of the evils and oppressions of which the power asserted might be made the instrument. But they may be summed up at once, and without the least exaggeration in the remark that, if the proposition be well grounded, then " those fundamental guarantees of personal rights that are recognized by the constitution as inhering in the freedom of the citizen " (*Interstate Commerce Commission v. Brimson*, 154 U. S., 447, 479) are, by the constitution itself placed absolutely at the mercy of a resolution of a single branch of Congress.

The " theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere."

Loan Association v. Topeka, 20 Wall., 655-663.

Consequently, the fourth amendment provides that " the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated "; and the fifth that no person shall be " deprived of life, liberty or property without due process of law."

In the *Slaughter House Cases*, 16 Wall., 36, 127, Mr. Justice SWAYNE said : " Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny."

In *Matter of Davies*, 168 N. Y., 89, the court said (p. 105) :

" It includes liberty of action which is interfered with by a command to lay aside all business and excuses and appear at a designated place and give testimony. It embraces the right to keep secret one's books and papers, his business methods and his knowledge of his own affairs."

In *Boyd v. United States*, 116 U. S., 616, it was held that a law of congress, which authorized a court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers, or that the allegations of the government respecting them should be taken as confessed, was unconstitutional and void as applied to suits for

penalties or to establish a forfeiture of the party's goods. The court, speaking by Mr. Justice BRADLEY, said (p. 631):

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."

In *in re Pacific Railway Commission*, 32 Fed. Rep., 241, Mr. Justice FIELD, after quoting the above passage, observed:

"The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party *otherwise than in the course of judicial proceedings, or a party suit for that purpose.* It is the forcible intrusion into, and compulsory exposure of one's *private affairs and papers*, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans."

The right of the individual to keep secret his books and papers, his business methods and his knowledge of his own affairs may, of course be interfered with *when the general good requires it.* Thus the power to punish for contempts, which is universally acknowledged to be vested in courts of justice, exists because it is "essential * * * to the due administration of justice."

Ex parte Robinson, 19 Wall., 505, 510.

In *Cooper's case*, 32 Vermont, 253, it was said (p. 257) that this power of the courts is "implied because it is *necessary to the exercise of all other powers.*"

"Considerations of inconvenience must give way to the paramount right of the litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeopardied, and the *administration of justice thwarted.*"

Wertheim v. Continental R. & Trust Co., 15 F. R., 716, 717.

But even so, care must be exercised to avoid "unnecessary and improper inquiry into *private affairs.*"

Robinson v. Phil. & R. R. Co., 28 Fed. Rep., 340, 342.

Similarly Congress, when in the exercise of its judicial powers, may itself punish recalcitrant witnesses (*Kilbourn v. Thompson*, 103 U. S., 168), and may also make their contumacy a criminal offense (*In re Chapman*, 166 U. S., 661), because without such power it would be unable to discharge its legitimate functions.

So Congress may competently invest administrative bodies with certain *quasi* judicial powers and invoke the aid of the courts in compelling testimony essential to the due exercise of such powers.

Interstate Commerce Commission v. Brimson, 154 U. S., 447.

To this extent qualifications may be imposed and the natural rights of the citizen somewhat abridged without infringing upon constitutional liberty; because on such occasions, there is no *unreasonable* search of private affairs, and the inconvenience put upon the witness is the result of *due process of law.*

But when the individual is dragged from his ordinary occupation and subject to an inquisition looking to the exposure of his own concerns, without *necessity*, and for pure purposes of private or public *convenience*, the search for information, whatever its motive or purpose, becomes *unreasonable*, and the resultant restraint upon the liberty of the citizen can no longer be said to be "due process of law."

Congress having no express power to compel individuals to furnish information which it may regard as needful for the exercise of its legislative functions, is that power conferred by implication by the last clause of section 8 of the constitution, which gives Congress authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof"?

(a)

A law which so directly affects the rights and liberties of the citizen cannot be said to be reasonably necessary for the exercise of the legislative power of Congress, unless it is one which is *absolutely and indispensably essential* to its exercise.

It was not thought to be so during the seventy years which preceded the enactment of the law of 1857. In that period the activities of Congress had never once been interrupted on account of its inability to secure all the enlightenment it needed from outside sources, however weighty the measures it had under consideration. Indeed, so far as the records of Congress disclose, neither of the branches of our national legislature had up to that time suffered the slightest embarrassment on that score. Standing and special committees pursued their labors from session to session, reported, or failed to report, measures, and legislation was enacted in due and regular order without any murmur of complaint because of the refusal of bankers or business men of any class to expose their private business or to betray the confidences of their fellow men. And fifty-seven years have since elapsed, by far the most momentous in our history, with the act of 1857 and its supplemental legislation constantly in force, without, until now, the remotest suggestion that the labors of Congress in that regard have ever been so hampered or impeded.

The explanation is a simple one: Congress can fully discharge its legislative duties without any recourse to the inquisitorial methods to which this appellant was attempted to be subjected. And *this view was clearly and deliberately expressed by this court in the Kilbourn case* (*Kilbourn v. Thompson*, 103 U. S., 168), where it was held that neither House of Congress possesses the general power of making inquiry into the private affairs of the citizen. The facts were these:

The firm of Jay Cooke & Co. were debtors of the United States, and it was alleged that they were interested in a 'real estate pool' in the city of Washington, and that the trustee of their estate and effects had made a settlement of their interests with the associates of the firm to the disadvantage and loss of numerous creditors, including the government of the

United States. The House of Representatives, by a resolution reciting these facts, authorized the speaker to appoint a committee of five to inquire into the matter and history of said 'real estate pool,' and the character of the settlement, with the amount of the property involved, in which Jay Cooke & Co. were interested, and the amount paid, or to be paid, in said settlement, with power to send for persons and papers, and report to the house. The committee was appointed and organized, and proceeded to make the inquiry directed. A subpœna was issued to Kilbourn, commanding him to appear before the committee to testify and be examined touching the matters to be inquired into, and to bring with him certain designated records, papers and maps relating to the inquiry. Kilbourn appeared before the committee, and was asked to state the names of the five members of the real-estate pool, and where each resided, and he refused to answer the question, or to produce the books which had been required. The committee reported the matter to the House, and it ordered the speaker to issue his warrant directed to the sergeant-at-arms to arrest Kilbourn, and bring him before the bar of the House to answer why he should not be punished for contempt. On being brought before the House, Kilbourn persisted in his refusal to answer the question, and to produce the books and papers required. He was thereupon held to be in contempt, and committed to the custody of the sergeant-at-arms until he should signify his willingness to appear before the committee and answer the question and obey the *subpœna duces tecum*; and it was ordered that in the meantime the sergeant-at-arms should cause him to be confined in the common jail of the District of Columbia. He was confined in that jail for forty-five days, when he was released on *habeas corpus* by the chief justice of the Supreme court of the District of Columbia. Upon his release he sued the Speaker of the house, the members of the committee, and the sergeant-at-arms for his forcible arrest and confinement. The defendants pleaded the facts recited, to which plea the plaintiff demurred. The demurrer was overruled and judgment ordered for the defendants. On a writ of error to this court the judgment was affirmed as to all the defendants except the sergeant-at-arms. They, being members of the House, were held to be protected from prosecution for their

action. But, as to Thompson, the judgment was reversed, and the cause remanded for further proceedings.

This court held that the resolution of the House of Representatives showed on its face that the investigation did not have for its object any legislative action, or the impeachment of any federal officer, but the collection of a debt owing to the Government, a power which is vested solely in the courts, that in ordering such an investigation the House of Representatives exceeded the limits of its powers, and that consequently the committee had no authority to require the plaintiff to testify before it. The decision was placed largely on this ground, though, in arriving at this conclusion, Mr. Justice MILLER discussed several other important and interesting points, and among them that now under consideration. He showed that the right of the House to punish a citizen for a contempt of its authority is derived solely from the Federal constitution, and that, while the House has the power to punish for contempt in certain cases in which its functions are judicial, it has no general jurisdiction on the subject. Whether the power to punish recusant witnesses extends beyond the cases in which express power to inquire is given by the constitution, the Court felt it unnecessary to decide, saying (p. 190):

"The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases. Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, *and we feel equally sure that neither of these bodies possess the general power of making inquiry into the private affairs of the citizen.*"

And again (pp. 194–5):

"The resolution adopted as a sequence of this preamble contains no hint of any intention of final action by Congress on the subject. In all the argument of the case no sugges-

tion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong, or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? *If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country.* By 'fruitless,' we mean that it could result in no valid legislation on the *subject to which the inquiry referred.*"

Although the court *expressly declined to decide* whether the power exists as a necessary incident of legislative power, Mr. Justice MILLER's language in that connection is more than significant. After observing that the power of Congress to punish for contempt could not be supported by the precedents and practices of the English Parliament, nor from the adjudged cases in which the English courts had upheld those practices, he said (p. 189):

"Nor, taking what has fallen from the English Judges, and especially the later cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation. This latter proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function."

The Court did, however, *expressly approve the decision of the Privy Council in the case of Kielley v. Carson*, 4 Moore's Privy Council Reports, 63, in which one of the points flatly decided was that the power of a legislature to punish for contempt is *not* one essential to the full discharge of its legislative powers, saying (p. 187):

"Measuring the weight of its authority by the reputation of the judges who sat in the case and agreed to the opinion,* it would be difficult to find one more entitled on that score to be received as *conclusive* on the points which it decided."

---

* Lord Chancellor Lyndhurst, Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, Vice Chancellor Shadwell, the Chief Justice of the Common Pleas, Mr. Justice Erskine, Dr. Lushington and Mr. Baron Parke.

And again (at p. 189):

"The opinion" (in *Kielley v. Carson*) "also discusses at length the necessity of this power in a legislative body for its protection, and to enable it to discharge its law-making functions, and *decides against the proposition.*"

In referring to the *Kilbourn case* some time later Mr. Justice MILLER said, in his Lectures on the Constitution (p. 112):

"It was held that neither House had any right to organize an investigation into the private affairs of the citizen and that, except in the case in which the Constitution expressly conferred upon the one body or the other the powers which were in their nature somewhat judicial and which required the examination of witnesses, they possess no power to compel by fine or imprisonment, or both, the attendance of such witnesses and answers to interrogatories which did not relate to some question of which it had jurisdiction."*

The case of *Kielley v. Carson* was an appeal from the Supreme Court of Judicature of Newfoundland. John Kent, one of the members of the House of Assembly of that island, reported to the House that Kielly, the appellant, had been guilty of a contempt of the privileges of the House in using toward him reproaches, in gross and threatening language, for observations made by Kent in the House, adding, "Your privilege shall not protect you." Kielley was brought before the House and added to his offense by boisterous and violent language, and was committed to jail under an order of the House and the warrant of the Speaker. Kielley sued Carson, the Speaker, Kent and other members, and Walsh the messenger, who pleaded the facts above stated and relied on the authority of the House as sufficient protection. The judgment of the Newfoundland Court, which was for the defendants, holding the plea good, was supported in argument before the Privy Council on the ground that the Legislative Assembly of Newfoundland had the same parliamentary rights and privileges which belonged by usage to the

---

* In commenting upon this case Professor Goodnow says:

"And while the Supreme Court expressly refuses to decide whether Congress had the power to force a witness to testify in cases where it desired information for its use in legislation, it seems to indicate in its opinion that Congress has no such power" (Comparative Administrative Law, Vol. 2, 269).

Parliament of England, and that, if this were not so, it was nevertheless a necessary incident to a body exercising legislative functions to punish for contempt of its authority.

The points expressly decided were that the power of committal for a contempt not committed in its presence, was not given the legislative assembly, expressly or by implication, by the commission establishing that body and the instructions which accompanied the commission; that such power is not essentially necessary for the exercise by a local legislature of any of its functions, and was not therefore granted to the Assembly by the act of its establishment, and that the fact that such power belongs to the House of Commons and the English courts of record afforded no authority for holding that it also belonged, as a legal incident, by the common law, to an assembly with analogous functions.

Mr. Baron Parke delivered the judgment, which was concurred in by all the eminent judges who were present at the hearing. He held that, because of the form of the pleas the question whether the House of Assembly could commit by way of imprisonment for a "contempt in the face of it," did not arise in the case. Having shown that "an authority materially interfering with the liberty of the citizen and much liable to abuse" could not be inferred from the "vague and general terms" of the commission and instructions, he continued (p. 88):

"The whole question then is reduced to this—whether by law, the power of committing for a contempt, not in the presence of the Assembly, is incident to every local legislature. The statute law on this subject being silent, the common law is to govern it; and what is common law, depends upon principle and precedent. Their Lordships see no reason to think, that in the principle of the common law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. '*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*' In conformity to this principle we feel no doubt that such an

Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their Legislative functions, they are justified in acting by the principle of the common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.

"These powers certainly do not exist in corporate or other bodies, assembled, with authority, to make by-laws for the government of particular trades, or united numbers of individuals. The functions of a Colonial legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question.

"It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the House of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And besides, this argument from analogy would prove too much, since it would be equally available in favor of the assumption by the Council of the Island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly—a claim for which there is not any color of foundation.

Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no court of record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident

to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage."

The case of *Kielly v. Carson* was followed by the Supreme Court of Van Dieman's Land in *Fenton v. Hampton*, 11 Moore's Privy Council Rep., 347, decided in 1858, and by the Privy Council in *Doyle v. Falconer*, L. R., 1 Privy Council, 328, decided in 1866.

In *Fenton v. Hampton*, the Comptroller General of convicts in that island, who had been summoned to appear as a witness before a select committee of the Legislative Council appointed to inquire into certain alleged abuses in the Convict Department, having refused to appear, and having subsequently disregarded an order requiring him to attend at the Bar of the Council, was adjudged in contempt and committed by warrant of the Speaker to the custody of the Sergeant-at-Arms, in whose custody he remained until the prorogation of the Council. He then brought an action for assault and false imprisonment against the Speaker and the Sergeant-at-Arms, who pleaded the above facts. The Supreme Court gave judgment in the Comptroller-General's favor, holding the pleas of justification insufficient in law.

The Chief Justice of the Supreme Court stated that the two questions presented were, first, whether the legislative council could commit for contempt a person who had disobeyed their order to appear at their bar, such order having been issued in consequence of the refusal of such person to give evidence before a select committee appointed in accordance with the standing rules and orders of the House, and second, assuming the existence of the authority, whether it had been rightly exercised. He held that an act of Parliament declaring that "all laws and statutes in force within the realm of England be applied in the administration of justice" gave no such express authority to the Council. The next consideration was therefore whether such authority passed "as a legal incident to the powers which were given." As to this he said (pp. 359–60):

"The argument on this point was shaped pretty much as follows:—'The Council is empowered to pass laws; to enable them to do so, it is essential they should inquire; such in-

quiry necessarily demands, in some instances, information from witnesses; such attendance must be compulsorily enforced, to prevent the power of legislation being defeated.' I here observe, that the pleadings in the present instance, show a case of inquiry only and fail to aver that such inquiry was for the purposes of legislation, or even that that end was in contemplation. Although if such were the object, this omission weakens the force of the foregoing argument, I am yet content to take it as it was advanced, and then its validity must depend, as my decision must also depend, upon the application of the legal maxim, '*Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest.*' It becomes, therefore, all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus:—Whenever anything is authorized, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment. But if, when the maxim comes to be applied *adversely to the liberties or interests of others*, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step farther, that it is only in some particular instances as opposed to its general operation, that the law fails in its intention, unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*."

Having reviewed and commented upon the authorities supporting this position, and noting the absence of any case where the powers of enforcing the attendance of witnesses, or of punishing them for their refusal to attend, had been implied in the absence of express legislation, he proceeded (pp. 364-366):

"Now, if the legal maxim under consideration is to prevail in the case before me, why should not its governing application have been recognized in the several instances to which I have adverted? If it be said that in some, express provision having been made, the necessity for the implied power is superseded, the answer is, that the express provision is made just because the implied power would not be attributed. To confer the incident in terms, where it passes by operation of law, is superfluous and inoperative—a breach of legal rule,

'*Expressio eorum quae tacite insunt nihil operatur.*' If it be said that a different rule ought to prevail in consequence of the higher dignity and importance which attach to legislative bodies, and to the powers and duties entrusted to them, the answer again is, that the question does not hinge upon the constitution of the body, but upon the grant—not on the exalted character of the functions to be performed, but on the extent of the jurisdiction which has been conferred. The more just solution of the problem will be found, as I take it, in this; that in erecting the different statutory bodies, Parliament has assumed that the power to hear and determine, to inquire and report, or to inquire and legislate, will, as a general rule, be effectually carried out, without difficulty and without obstruction; and if in particular instances an impediment should arise from the neglect or contumacy of a witness, it is a safer rule of construction to regard such a *casus omissus*, to be met by other means, than to imply a power of infringing upon the personal liberty of the subject. '*Ad ea quae frequentius accidunt jura adaptantur,*' is equally a maxim of law with that which I am considering; and where the words of the statute do not reach to an inconvenience, rarely happening, they ought not to be extended to it by construction. *Bole v. Morton* (Vaughan's Rep., 373). Now, the work of legislation has hitherto been carried on here readily and without impediment; the information on which it is founded is ordinarily of a public character, obtainable without difficulty; the matter notorious; the members conversant with what is transpiring around them generally inform themselves by the evidence of their senses, or by common report. Let it be conceded that occasions may arise in which inquiry by the examination of witnesses ought to precede legislation; how rarely would it happen that any party required to attend would refuse; but even assuming such refusal, rare indeed would be the case, and such is not shown in this instance, where such party constituted the only fountain from which the required information could be drawn. Taking, however, that extreme and exceptional case, it would still be insufficient to let in the application of the maxim that things necessary pass as incident to the grant, to the extent which has been assumed, or to found the power or privilege which has been here exercised; because as regards the former, the legal power to legislate still exists, although its exercise in the particular instance is impeded; and as regards the latter, because necessity alone, is inadequate to sustain such a power. If the House of Commons claimed a new privilege tomorrow, the exercise of which would invade the right of personal freedom beyond their walls, and the matter came before the Superior Courts in a shape in which they could take cognizance of it, I

apprehend it would not be enough to establish an unanswerable case of simple necessity ; it would be essential to add to that necessity, the evidence of usage. *Burdett v. Abbott* (14 East., 150), *et per* Littledale, and Coleridge, in *Stockdale v. Hansard* (9 Ad. & Ell., 1)."

The Chief Justice found nothing to take the case out of the ruling in *Keilley v. Carson*; but his associate thought the effect of the Act of Parliament was to introduce so much at least of the *Lex Parliament* as was applicable to the Colony (pp. 378–386).

The case was carried to the Privy Council, where an attempt was made to distinguish the case of *Keilley v. Carson* as a "case of assumed parliamentary privilege, not of the exercise of power incident to legislative action" (pp. 387–89).

The Judicial Committee (Lord Chief Baron POLLOCK delivering the judgment) held that there was no foundation for this distinction and that they were bound by their former decision (pp. 395–97). The Committee did not consider the question of whether or not the Council had the power to make the inquiry out of which the proceedings arose, as one "inherently belonging to their supreme legislative authority," Baron POLLOCK merely observing in that connection that "it sufficiently appeared by the pleas that this was an arrest with a view to punish for an act alleged to be a contempt, but committed away from the House of Assembly" (p. 397).

In *Doyle v. Falconer*, L. R. 1 Privy Council, 328, it was held that the Legislative Assembly of the Island of Dominica, which had no judicial functions, did not possess the power of punishing a contempt, *even though committed in its presence* and by one of its members. The facts were as follows: The respondent, a member of the lower house of the Dominican Assembly, having whilst addressing the House, been called to order by the Speaker and House, retorted by saying to the former, "You are a disgrace to the House." Being called upon to apologize and refusing to do so, he was declared in contempt. While so in contempt, he further interrupted and obstructed the business before the House, whereupon he was committed on the warrant of the Speaker. Having brought an action for assault and false imprisonment against the Speaker and the members of the House, the latter pleaded the above facts in justification.

Demurrers to the pleas were sustained by the Court of Com
mon Pleas of Dominica, and the case was then taken by ap
peal to the Privy Council.

It was admitted that the case of *Keilly v. Carson* had de
cided conclusively that the legislative assemblies in th
British Colonies had, in the absence of express grant, no pow
to adjudicate upon or punish for contempts committed beyon
their walls ; but counsel for the appellants contended that th
Assembly must be held to possess the power to punish for
contempt committed in its *presence*, since such a power wa
indespensable necessary to its existence.

In holding the proposition untenable, the Judicial Com
mittee said (pp. 340–341) :

"It is necessary to distinguish between a power to punis
for a contempt, which is a judicial power, and a power to re
move any obstruction offered to the deliberations or prope
action of a Legislative body during its sitting, which last powe
is necessary for self-preservation. If a member of a Colonia
House of Assembly is guilty of disorderly conduct in th
House whilst sitting, he may be removed, or excluded for
time, or even expelled; but there is a great difference betwee
such powers and the judicial power of inflicting a penal sen
tence for the offence. The right to remove for self-security
one thing, the right to inflict punishment is another. Th
former is, in their Lordships' judgment, all that is warrante
by the legal maxim that has been cited, but the latter is no
its legitimate consequence. To the question, therefore, o
which this case depends, their Lordships must answer in th
negative. If the good sense and conduct of the members o
Colonial Legislatures prove, as in the present case, insufficien
to secure order and decency of debate, the law would sanctio
the use of that degree of force which might be necessary t
remove the person offending from the place of meeting and t
keep him excluded. The same rule would apply, *a fortiori*, t
obstructions caused by any person not a member. And when
ever the violation of order amounts to a breach of the peac
or other legal offence, recourse may be had to the ordinar
tribunals.

"It may be said that the dignity of an Assembly exe
cising supreme legislative authority in a Colony, howeve
small, and the importance of its functions, require mor
efficient protection than that which has just been in
dicated ; that it is unseemly or inconvenient to subject th
proceedings of such a body to examination by the loca
tribunals ; and that it is but reasonable to concede to it

power which belongs to every inferior court of record. On the other hand, it may be urged, with at least equal force, that the power contended for is of a high and peculiar character; that it is in derogation of the liberty of the subject, and carries with it the anomaly of making those who exercise it judges in their own cause, and judges from whom there is no appeal; and that if it may be safely intrusted to magistrates, who would all be personally responsible for any abuse of it to some higher authority, it might be very dangerous in the hands of a body which, from its very constitution, is practically irresponsible.

"Their Lordships, however, are not at liberty to deal with considerations of this kind. There may or may not be good reasons for giving by express grant to such an assembly as this, privileges beyond those which are legally and essentially incident to it. * * * But their Lordships, sitting as a court of justice, have to consider not what privileges the House of Assembly of Dominica ought to have, but what by law it has. In order to establish that the particular power claimed is one of those privileges, the appellants must shew that it is *essential to the existence of the Assembly*, an incident '*sine quo res ipsa esse non potest.*' Their Lordships are of opinion that it is not such an incident."

In *in re Pacific Railway Commission*, 32 Fed. Rep., 241, the Circuit Court for the Northern District of California held (Mr. Justice Field, Sawyer and Sabin, Circuit Judges, concurring) that the Act of March 3, 1887, "authorizing an investigation of the books, accounts and methods of railroads which have received aid from the United States and for other purposes," was unconstitutional in so far as it undertook to empower the commission to investigate the private affairs, books and papers of the officers and employees of corporations indebted to the Government as to their relations to other companies with which they had had dealings, except so far as such officers and employees were willing to submit the same for inspection; and, furthermore, that Congress could not make the courts its instruments in conducting mere legislative investigations. The case arose upon an application of the commission for an order requiring Leland Stanford, the president of the Central Pacific Railroad Company which had received aid in bonds from the Government, to appear before it to answer certain interrogatories propounded to him.

In the statement of facts, which was prepared by Mr. Justice Field, the nature and extent of the authority which

Congress had attempted to confer on the commission were thus pointed out (pp. 242–3):

"That act authorizes the president to appoint three commissioners to examine the books, papers and methods of all railroad companies which have received aid in bonds from the government, and in terms invests them with power to make a searching investigation into the working and financial management, business and affairs of the aided companies; and also to ascertain and report 'whether any of the directors, officers or employees of said companies, respectively, have been, or are now, directly or indirectly, interested, and to what amount or extent, in any other railroad, steamship, telegraph, express, mining, construction, or other business company or corporation, and with which any agreements, undertakings, or leases have been made or entered into; what amounts of money or credit have been loaned by any of said companies to any person or corporation; what amounts of money or credit have been or are now borrowed by any of said companies, giving names of lenders and the purposes for which said sums have been or are now required; what amounts of money or other valuable consideration, such as stocks, bonds, passes, and so forth, have been expended or paid out by said companies, whether for lawful or unlawful purposes, but for which sufficient and detailed vouchers have not been given or filed with the records of said company; and further, to inquire and report whether said companies, or either of them, or their officers or agents, have paid any money or other valuable consideration, or done any other act or thing, for the purpose of influencing legislation.'

"It is difficult to express in general terms," he said, "the extent to which the commissioners are required to go in their inquisition into the business and affairs of the aided companies, or the extent to which they may not go into other business and affairs of its directors, officers and employes. The act itself must be read to form any conception of the *all-pervading character of the scrutiny* it exacts of them. And it provides that the commissioners, or either of them, shall have the power 'to require the attendance and testimony of witnesses, and the production of all books, papers, contracts, agreements and documents relating to the matter under investigation, and to administer oaths; and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of books, papers and documents.' And it declares that 'any of the circuit or district courts of the United Statos within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpœna issued to any person, issue an order

requiring any such person to appear before said commissioners, or either of them, as the case may be, and produce books and papers, if so ordered, and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.' And also that 'the claim that any such testimony or evidence may tend to criminate the person giving such evidence, shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.'"

It appears that while the witness was under examination respecting the affairs of the Central Pacific Railroad Company, vouchers were produced and verified representing moneys of the Company aggregating $733,725.62, which had been expended by the witness and by him charged to the Company, and by the Company subsequently reimbursed to him. The objects to which these moneys had been applied did not appear on the face of the vouchers, except that they were stated to have been for "general expense account" or for "legal services", and except, also, that in a few instances the initials of persons to whom the money purported to have been paid were given. The questions which the witness refused to answer sought to elicit the circumstances of these expenditures, and particularly whether any of the moneys had been used for the purpose of influencing legislation. An order having been entered on the petition of the commissioners requiring the witness to show cause why he should not be compelled to answer the interrogatories of the Commission, he filed an answer in which he set forth, among other things,

"that by the decision of the Supreme Court the relation between the United States and the railroad company is that of creditor and debtor, and that the rights of both are those springing from that relation; that the examination made by the commission has not only extended to the affairs of the Central Pacific Railroad Company, but has extended to a searching investigation of the affairs of all the consolidated and allied companies connected with that corporation; and that their affairs have been examined into, not only by the experts of the commission, but the commissioners themselves, and their business relations have been exposed to the public and the prying curiosity of rival business competitors; and that the commission insists upon investigating matters with which the govern-

ment has and can have no possible concern; that the disposition the company may have made of such portion of its assets or earnings as the government has not and never had any interest in is of this character; and yet the commission insists upon answers to questions respecting such disposition which can have no possible effect upon the relations between the company and the government, and can only tend to cast suspicion upon parties whose names may be mentioned; and as the subjects in respect to which these questions are propounded are of an exclusively private character, in no way effecting the interests of the government, neither the company nor its officers feel called upon to answer."

The respondent also made, Mr. Justice Field said, the "extraordinary statement" that he was constrained to this course

"as the gentlemen of the commission have distinctly and repeatedly avowed, in the course of their examination, that they do not regard themselves bound in such examination by the ordinary rules of evidence; that they would receive hearsay and *ex parte* statements, surmises suspicious, and all character of information that might be called to their attention."

The respondent denied that he had ever corrupted, or attempted to corrupt, any member of the legislature, or any member of congress, or any public official, or had ever authorized any agent to do so; and averred that all the claims covered by the vouchers had received, not only the approval of the board of directors of the Central Pacific Railroad Company, but likewise the approval of the stockholders of that company; that all parties who could in any wise legally or equitably be affected by the disbursements embraced in them were fully satisfied therewith, and had ratified and approved of the same.

In addition, he stated that in the conduct and management of a business of the magnitude of the Central Pacific Railroad Company, and the various corporations consolidated and allied therewith, it was impossible not, from time to time, to have to do business involving disbursements which every dictate of business prudence would not admit of being made public; that arrangements of a private character, names of parties not publicly known, and the disclosures of which could only result in defeating the ends in view, and exposing the persons so named to suspicion and obloquy, would forbid

making the same public, either upon the archives of the company, or before a public commission; that that course of policy was not only sanctioned by ordinary experience in business life, but that the government of the United States and that of the State of California, as well as the government of the city and county of San Francisco, severally, allowed to their chief magistrates money, the investment of which was commiited exclusively to their judgment and discretion, and for which detailed vouchers were never required.

He added that the commission deemed it its duty to propound questions involving criminality on his part, and on the part of the persons whose names were mentioned in such questions, answers to which, for the reasons stated, he had felt constrained to decline to make; that, acting not only on his own behalf, but on behalf of those whose interests as stockholders of the Central Pacific Railroad Company were committed to his charge, he felt bound to decline to answer them unless he was otherwise directed by the court.

The purport of the answer was that the government had no legal interest in the matters in relation to which the interrogatories were propounded; that he had answered them so far as it was in his power to do so, and that he was shielded by the constitution from answering questions implying criminality in his conduct, and calculated to cast aspersions upon others.

The court denied the application. Mr. Justice Field pointed out that the commission was not a judicial body, and possessed no judicial power under the act creating it, and that it could determine no rights of the government or of the corporations whose affairs it was appointed to investigate. After showing that such an investigation as that directed by the Act of 1887 was to be distinguished from the inquiries authorized upon taking the census, he continued (pp. 250-1):

"It (Congress) may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it cannot compel the production of the private books and papers of the citizen

for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon avermeuts that its rights are in some way dependent for enforcement upon the evidence those books and papers contain. Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners.

* * * * * * *

"In his opinion in the celebrated case of *Entick vs. Carrington*, reported at length in 19 How. State Tr. 1029, Lord CAMDEN said: 'Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot, by the laws of England, be guilty of a trespass, yet, where papers are removed and carried away, the secret nature of those goods will be an aggravation of the tresspass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.' Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord CAMDEN, said the supreme court of the United States, 'affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the government, and its employes, of the sanctity of man's home and the privacies of life.'"

In holding that the act conferred no power upon the commission to inquire into the private affairs of witnesses beyond

what the latter might voluntarily disclose, Mr. Justice Field said (pp. 253–4):

"The act of congress not only authorizes a searching investigation into the methods, affairs and business of the Central Pacific Railroad Company, but it makes it the duty of the railway commission to inquire into, ascertain and report whether any of the directors, officers or employes of that company have been, or are now, directly or indirectly, interested, and to what extent, in any railroad, steam-ship, telegraph, express, mining, construction, or other business company or corporation, and with which any agreements, undertakings or leases have been made or entered into. There are over 100 officers, principal and minor, of the Central Pacific Railroad Company and nearly 5,000 employes. It is not unreasonable to suppose that a large portion of these have some interest, as stockholders or otherwise, in some other company or corporation with which the railway company may have an agreement of some kind, and it would be difficult to state the extent to which the explorations of the commission into the private affairs of these persons may not go if the mandate of the act could be fully carried out. But in accordance with the principles declared in the case of *Kilbourn v. Thompson*, and the equally important doctrines announced in *Boyd v. U. S.*, *the commission is limited in its inquiries as to the interest of these directors, officers, and employes in any other business company, or corporation to such matters as these persons may choose to disclose.* They cannot be compelled to open their books, and expose such other business to the inspection and examination of the commission. They were not prohibited from engaging in any other lawful business because of their interest in and connection with the Central Pacific Railroad Company, and that other business might as well be the construction and management of other railroads as the planting of vines, or the raising of fruit, in which some of those directors and officers and employes have been in fact engaged. And they are entitled to the same protection and exemption from inquisitorial investigation into such business as any other citizens engaged in like business."

Judge Sawyer said (p. 263):

"A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission, without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be estab-

lished, and there is no knowing, where the practice under it would end."

Judge Sabin, after noting the admission of the commissioners that the account in reference to which many of the questions had been propounded had long before been fully adjusted between the government and the company, said (p. 269) :

" If this be true, what interest, then, is it to the United States, even if it had a right so to do, to inquire how, or in what manner this account accrued or was paid ? It concerns the United States in no manner—affects no pecuniary right or interest claimed by it, due or not matured. What interest, then, has the United States in this inquiry beyond that of any third party whose curiosity might prompt him to inquire into that concerning which he has no right or interest ? Is not this, then, a mere idle inquiry, not made in the interest of, or to preserve or establish the rights of, the government or any person ? Has not any third person, to gratify an idle curiosity, the same right to institute these inquiries, and invoke the aid of the courts in support thereof ? Courts do not entertain such investigations or inquiries, or lend their aid thereto. If this power of unlimited, inquisitorial investigation into the affairs of private corporations or companies, or of individuals—*and it concerns all alike*—shall be once established, who can say where it will end, or what will be its limit of injustice at all times, but more especially when called into exercise in times of political excitement, or under the influence of *partisan zeal* or passion ? In the close adherence to well-settled principles of law, founded upon the just observance of the rights of all parties, will we not find the greatest safety alike to public and private rights ? "

In *Interstate Commerce Commission v. Brimson*, 154 U. S., 447 (1894), it was held, among other things, that the twelfth section of the Interstate Commerce Act authorizing the Circuit Courts of the United States to use their process in aid of legitimate inquiries before the Commission was not in conflict with the constitution as imposing on judicial tribunals duties not judicial in their nature, and that a petition filed as the basis of a proceeding to compel a witness to produce books and papers relating to the matter under investigation by the Commission made a case or controversy to which the judicial power of the United States extended. But it was also held

that the power to regulate commerce did not carry with it authority to destroy or impair those fundamental guarantees of personal rights which are recognized by the constitution as inhering in the freedom of the citizen. And it was *plainly intimated that Congress itself had no such unlimited power* to inquire into the private affairs of individuals as that which it is here claimed was conferred by the House of Representatives on the Committee to whose demands the appellant refused to comply. The court said (pp. 478–9) :

" In accomplishing the objects of a power granted to it Congress may employ any or all of the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the constitution. We do not overlook these constitutional limitations, which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U. S., 168, 190. We said in *Boyd v. United States*, 116 U. S., 616, 630—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice FIELD in *In re Pacific Railway Commission*, 32 Fed. Rep., 241, 250, ' of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.'

" It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees. This court has already spoken fully upon that general subject in *Counselman v. Hitchcock*, 142 U. S., 547. We need not add anything to what has been there said. Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and

to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits."

In the case just cited, although the question was not before the court—the investigation which the Commission was there conducting being based on an informal complaint—Mr. Justice Harlan expressed the view (154 U. S., at p. 447) that the power to compel information was essential to the full performance of its duty to recommend legislation.

This idea was, however, emphatically repudiated in *Harriman v. Interstate Commerce Commission*, 211 U. S., 407, where it was held, that notwithstanding the broad and sweeping language of the statute creating the commission, and its amendatory acts, the power of the Commission to require testimony was limited to investigations concerning a *specific breach of existing law.* Mr. Justice Holmes, in delivering the opinion of the Court, said (pp. 417-20):

"Before taking up the words of the statute the enormous scope of the power asserted for the commission should be emphasized and dwelt upon. The legislation that the commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several States. And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only, legitimately influence the mind of the commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By Sec. 12 of the act of 1887, the commission has authority to

require the attendance of witnesses 'from any place in the United States, at any designated place of hearing.' No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

"How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. *Whether Congress itself has the unlimited power claimed by the commission, we also leave on one side.* It was intimated that there was a limit in *Interstate Commerce Commission v. Brimson*, 154 U. S., 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act.

* * * * * * *

The commission it will be seen is given power to require the testimony of witnesses 'for the purposes of this Act.' The argument for the commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the commission; that one of the purposes is that the commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12; that another is that it shall recommend additional legislation under § 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require any one whom it may point out to attend and testify if he would avoid the penalties for contempt. We are of opinion, on the contrary, that the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases *where the sacrifice of privacy is necessary*—those where the investigations concern a specific breach of the law."

Further (p. 421):

"If by virtue of § 21 the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testi-

mony might furnish data considered by the commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the *quasi*-judicial duties of the commission, we still should be unable to suppose that such an *unprecedented grant* was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such *autocratic power* was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that *personal matters* should be revealed."

All that was decided in the *Chapman case* (166 U. S., 661) was that section 102, when reasonably construed, was not open to constitutional objections. In that case it was held to apply to an investigation by a committee of the Senate, under a resolution directing them to inquire " whether any senator has been, or is, speculating in what is known as sugar stocks during the consideration of the tariff bill now before the Senate," and that questions propounded to a witness, who was a member of a brokerage firm, by which it was sought to elicit whether his firm had been employed by any senator to buy or sell sugar stocks were pertinent to the subject matter of the inquiry. Answering the objection that these questions amounted to an unreasonable search into the witness's private affairs, the Court said (pp. 668-9) :

" *According to the preamble and resolutions, the integrity and purity of members of the Senate had been questioned in a manner calculated to destroy public confidence in the body, and in such respects as might subject members to censure or expulsion.* The Senate, by the action taken, signifying its judgment that it was called upon to vindicate itself from aspersion and to deal with such of its members as might have been guilty of misbehavior and brought reproach upon it, obviously had jurisdiction of the subject matter of the inquiry it directed, and power to compel the attendance of witnesses, and to require them to answer any question pertinent thereto. And the pursuit of such inquiry by the questions propounded in this instance was not, in our judgment, in violation of the security against unreasonable searches and seizures protected by the Fourth Amendment. In *Kilbourn v. Thompson*, 103 U. S., 168, among other important rulings, it was held

that there existed no general power in Congress or in either House to make inquiry into the private affairs of a citizen; that neither House could, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, investigate the affairs of that partnership, as a mere matter of private concern; and that consequently there was no authority in either House to compel a witness to testify on the subject. The case at bar is wholly different. *Specific charges publicly made against Senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary.* The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent or details of the business of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any Senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. We cannot regard these questions as amounting to an unreasonable search into the private affairs of the witness simply because he may have been in some degree connected with the alleged transactions, and as investigations of this sort are within the power of either of the two Houses they cannot be defeated on purely sentimental grounds. The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire 'whether any Senator has been, or is speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.' What the Senate might or might not do upon the facts when ascertained, we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers."

(*b*)

The decisions holding that state legislatures possess the authority to compel information in aid of legislation proceed upon the mistaken assumption of the *necessity* of the power.

Burnham v. Morrissey, 14 Gray, 226, 239.
In re Falvey, 7 Wis., 630, 637.
People ex rel. McDonald v. Keeler, 99 N. Y., 463, 482.

If the necessity could be made out, no more need be said. But, as we have seen, the supposed necessity, when we examine it, dwindles down to a very dubious kind of expediency.

The decisions of the state courts, furthermore, adopt the doctrine which can, of course, have no possible application to the Congress of the United States, that a legislature is the "grand inquest" of the state.

Without pointing out many obvious reasons why those decisions should have no weight in determining the question here under consideration, it should be enough to say that they are wholly irreconcilable with the decision of the Privy Council in *Keilley v. Carson*, which this Court has treated as "*conclusive on the points which it decided*" (103 U. S., 187).

(c)

Congress has not always supposed itself possessed of the power now asserted by the House of Representatives. In 1827 the Committee on Manufactures of the House, which at this period sometimes reported revenue bills, having submitted a resolution, by which it was proposed that the Committee "be vested with power and authority to send for persons and papers," an amendment was offered striking out the words "vested with power to send for persons and papers," and inserting: "empowered to send for and to examine persons, on oath, concerning the present condition of our manufactures, and to report the minutes of such examination to this House."

Hinds' Precedents, Vol. III., sec. 1816, pp. 141-2.

It appears from the debate that this amendment was "intended to authorize the committee to send for and examine witnesses, *but not to compel their attendance against their will*" (p. 142).

It was stated in favor of the proposition "that the committee, in framing the tariff bill, found many conflicting memorials before them, and that the truth could be arrived at best by oral testimony. This course had been pursued by the House of Commons. The power asked for could not be considered dangerous, for the subject deeply affected the interests

of the people, and it was proposed merely to compel the attendance of witnesses, a power exercised in the most insignificant cases of litigation between persons. The *viva voce* examination was much more satisfactory than the written memorials. The *common law of Parliament* should dictate that the legislature must possess the power requisite to procure the information needed in order to act understandingly. Committees of investigation enjoyed the powers. Indeed, it seemed true that committees already had the power to examine under oath, the statutes conferring on the chairman the power to administer oaths."

Id., p. 141.

In opposition, it was argued that "no one could cite a case in the House of Representatives where a demand for like powers had been made by a committee whose duties were similar to those of the Committee on Manufactures. The power to send for persons and papers had hitherto been exercised by committees having *judicial* functions and exercising the judicial power of the House. To send the Sergeant-at-Arms to all parts of the country to compel citizens to attend and testify on a tariff matter would be an extraordinary exercise of a power hitherto used only in cases of contested elections and impeachments. The powers of the House of Representatives could not be compared with those of the House of Commons, since the latter was restrained by no written constitution. *And it had not been made plain that the House of Commons had ever issued a compulsory process in such a case.*"

Id., pp. 141-142.

The amendment was agreed to, 100 ayes to 78 noes, and the resolution as amended was then passed, yeas 102, noes 88.

Ten years later a special committee of the House distinctly disclaimed any pretense of authority to compel the production of private papers or to examine into private transactions. In January, 1837, a committee was appointed "to inquire whether the several banks employed for the deposit of the public money have all, or any of them, by joint or several contract, employed an agent to reside at the seat of government to transact their business with the Treasury Department, what is the character of the business which he is so employed to transact, and what compensation he receives; whether such

agent, if there be one, has been employed at the request or through the procurement of the Treasury Department; whether the business of the Treasury Department with said banks is conducted through said agent; and whether in the transaction of any business confided to said agent, he receives any compensation from the Treasury Department; and that said committee have power to send for persons and papers."

One Whitney, whom from the terms of the omnibus subpœna which was served on him the committee plainly *knew* to be the agent so employed (just as the "Money Trust" committee must have known the details of the syndicate operators regarding which they questioned the appellant; see documents produced under this subpœna, Record, pp. 33–39, 71, 72), appeared before the committee, but declined to answer certain questions and to produce certain papers.

In a written protest he pointed out that the inquiry had two branches—first, as to whether he had been employed as agent of the banks through the procurement of the Treasury Department and had received compensation from that department; and, second, as to his business arrangements with the deposit banks.

As to the first branch, he said he had answered all questions and still held himself ready to answer all such; but the questions falling under the second branch he had not answered, on the ground that they were inquisitorial in their nature, going into personal and *private transactions and relations between himself and his employers.* With reference to the power of Congress to compel the production of evidence he said:

"If the power to send for 'papers,' which may be rightfully delegated to and exercised by a committee of Congress, be susceptible of any more reasonable limits than that of the power to send for 'persons,' I am advised that it may be clearly reduced to two simple heads:

"1. All that can be denominated public papers, as belonging to the public archives of any Departmenf of the Government, and which may be required for the information of Congress upon any matter touching the public administration.

"2. Such private papers in the hands of individuals as are necessary to the advancement of justice in the exercise of the *judicative power* of Congress, understanding that power as limited to impeachments. Then such private papers, and such only, are included as would, if produced, be competent evidence in a criminal prosecution, and in a prosecution not against the party cited to produce the papers"

The committee did not attempt to compel the witness to answer questions which he considered inquisitorial, but filed a report, in which they made this meek response to Whitney's protest:

"As relates to the resolution of the committee, the whole argument of the protest is based upon the idea that the committee has asserted a claim of power, in compelling the production of private papers and in examining into private transactions, which it has not done. The resolution is general, and calls for no specific paper; its calls generally for such papers, etc., as may refer to and shed light upon the inquiries directed by the House. The committee, in adopting this resolution, made it general, because they had no knowledge of the peculiar character of the papers held by the witness, whether they were of a purely private or public character, and could not, therefore, designate any particular paper for which to make a call, and because they thought it due to the witness himself that he might have the opportunity of producing such papers of a private character as he might deem necessary for the purpose of explanation if such explanation should be deemed necessary by him. * * * The committee has not in a single instance attempted to enforce the production of any paper objected to by the witness. * * * *The committee does not claim for the House or itself the power to compel the deposit banks to expose their private concerns or private transactions to the scrutiny of the committee,* nor has the committee in any instance demanded such exposure. Yet, while the committee does not assert any such claim of power, it holds it decidedly within the power of Congress to ascertain, by *other* competent and legal testimony, any of the transactions of the deposit banks which are calculated to affect *the safety of the public funds,* and to render some action on the part of Congress necessary for their security."

Hinds' Precedents, Vol. III., pp. 95-6.

So far as we can learn, the Senate did not assert the power to compel testimony in aid of legislation until 1860, and then on an occasion and under conditions which entitle its action to little respect as a precedent, for it was one of the series of outrages committed by the sectional party then dominant in both houses of Congress which precipitated the war between the North and the South. John Brown's raid at Harper's Ferry having been seized upon as a pretext by the pro-slavery leaders for the charge that Brown was an emissary of the Abolitionists, a Senate committee was appointed, with James

M. Mason, the author of the Fugitive Slave Law, as its chairman, to investigate the facts attending the raid, ostensibly for the purpose of framing legislation, but in reality in an attempt to implicate leaders of the Republican party and the inhabitants of the free-labor states, generally, in a scheme for liberating the slaves. In the course of the debate which preceded the passage of the resolution, Charles Sumner delivered a masterly address in which he pointed out the absence of power in the Senate to enter upon the proposed inquiry. But it was easier to outvote Sumner's arguments than to answer them, and the resolution was carried. Subsequently, in the course of a report of the Committee on the Judiciary concerning the sufficiency of a warrant for the arrest of Thaddeus Hyatt, who had disregarded the summons of the investigating Committee, the assumption was made that the Senate had the power. Hyatt was committed for contempt and confined in the common jail of the District of Columbia for several months. When, at the end of that time, his release was moved, Sumner said :

"Mr. President, I welcome with pleasure the proposition for the discharge of Mr. Hyatt from his long incarceration in the filthy jail where he has been detained by the order of the Senate, but I am unwilling that this act of justice should be done to a much injured citizen without for one moment exposing the injustice which he has received at your hands.

* * * * * * *

The present inquiry is neither preliminary to an impeachment nor on the trial of an impeachment. It has no such element to sustain it. It is precisely the same as if an inquiry should be instituted into the murder of Dr. Burdell in New York, or into the burning of slaves in Alabama, or into the banks of New York * * * with regard to all of which the Senate has no judicial power. * * * I know it is said that this power is necessary in aid of legislation. I deny the necessity. *Convenient* at times it may be; but *necessary*, never. We do not drag the members of the cabinet or the President to testify before a committee in aid of legislation; but I say, without hesitation, they can claim no immunity which does not belong equally to the humblest citizen. Mr. Hyatt and Mr. Sanborn have rights as ample as if they were office holders. Such a power as this which, without the sanction of law, and merely at the will of a partisan majority, may be employed to ransack the most distant states, and to drag citizens before the Senate all the way from Wisconsin or from South

Carolina may be convenient, and to certain persons may seem to be necessary. * * * Let me be understood as admitting the power of the Senate where it is essential to its own protection or the protection of its privileges, but not where it is required merely in aid of legislation. *The difference is world-wide between what is required for protection and what is required merely for aid.* * * * With these remarks, I quit this question, anxious only that the recent usurpation of the Senate may not be drawn into a precedent hereafter."

Smith's Digest of Decisions and Precedents (Senate Doc. No. 278; 53rd Cong., 2nd Sess.), p. 293–4.

(d)

The fact that in recent years it has been the habit or practice of Congress to clothe its investigating committee with apparent authority to coerce information in the pursuit of knowledge is the very weakest evidence of its constitutional power to do so.

In *Stockdale v. Hansard*, 9 Ad. & E. 1, a plea to the declaration justified the libel under an order of the House of Commons, and set forth a resolution that the power of publishing its proceedings was an essential incident to the functions of Parliament. The Court of Queens Bench (Lord Denman, C. J., Littledale, J., Patteson, J., and Coleridge, J.), held that it was competent for the court to inquire whether the privilege so asserted existed or not, and decided that it did not. In answer to the contention that the proof of the supposed privilege rested, among other things, on practice and universal acquiescence, Lord DENMAN said (p. 155):

"The *practice* of a ruling power in the state is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by Hampden;* general warrants had been issued and enforced for centuries, before they were questioned in actions

* "Had Mr. Hampden reasoned and acted like the moderate men of these days, instead of hazarding his whole fortune in a law suit with the crown, he would have quietly paid the twenty shillings demanded of him, the Stuart family would probably have continued upon the throne, and at this moment the imposition of ship-money would have been an acknowledged prerogative of the crown." Junius, Letter XXXIX., May 28, 1770.

by Wilkes and his associates, who, by bringing them to the test of law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much; for the admitted and grossest abuses of privilege have never been questioned by suits in Westminster Hall. The most obvious reason is, that none could have commenced a suit of any kind for the purpose, without incurring the displeasure of the offended house, instantly enforced, if it happened to be sitting, and visiting all who had been concerned. During the session, it must be remembered that privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law, while privilege, with one voice, accuses, condemns, and executes, and the order to 'Take him,' addressed to the Sergeant-at-Arms, may condemn the offenders to persecution and ruin. Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced a general persuasion that the privilege existed in point of law?"

It would be a curious result of the struggle of eight centuries to erect a constitutional and representative government should it now come to pass that the citizen must elect to go to prison or sacrifice the privacy of his personal affairs. This right is forfeited only in a few cases and those upon the ground of necessity; never upon the ground of mere convenience to the legislative body.

"Doubtless," says Blackstone, "all arbitrary measures well executed are the most convenient, but mere convenience is not a proper reason under a free government for the assumption of powers not granted, and this is especially the case where the powers are arbitrary and despotic and touch the liberty of the citizen" (4 Commentaries, 350).

Surely a power so dangerous to the fundamental and most intimate rights of the citizen could not be justified except upon indisputable authority and because of the clearest necessity. It is a menace to private right, possibly disguised, but insidious and progressive. It should be viewed with the admonition of Mr. Justice BRADLEY (*Boyd v. United States*, 116 U. S., 616, 635):

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent

approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

THIRD. THE APPELLANT WAS ENTITLED TO REFUSE TO ANSWER BECAUSE THE QUESTIONS ASKED OF HIM WERE NOT "PERTINENT TO THE QUESTION UNDER INQUIRY."

In the *Harriman* case, 211 U. S., 407 (*ante*, p. 74), this court rejected the claim asserted by the Interstate Commerce Commission of authority under the statute of its creation to require a witness to disclose any facts, no matter how private, which might influence the mind of the Commission in its recommendations to Congress on the subject of legislation. Mr. Justice HOLMES observed (p. 417): "If we qualify the statement and say only, *legitimately* influence the mind of the Commission in the opinion of the Court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. * * * No such unlimited command over the liberty of all citizens was ever given, so far as we know, in constitutional times to any commission or court." Whether *Congress itself* possessed the unlimited powers claimed by the commission, and "*whether it could delegate the power*, if it possesses it," the court left undecided, "beyond remarking that so unqualified a delegation would prevent the constitutional difficulty in *most acute form.*"

The statute upon which the prasent prosecution rests assumes the existence of power in Congress, and the right to delegate it to a committee of one house, of infinitely greater extent than that asserted by the Interstate Commerce Commission. If, notwithstanding this, the statute is unobjectionable on constitutional grounds and a Congressional Committee engaged in the pursuit of knowledge for legislative use may pry into and compel the exposure of the most intimate and sacred affairs of private citizens, provided only that the

matters so exposed may *legitimately* influence the mind of the Commission, *even on this theory* the inquiry still remains whether in the language of the statute the questions which the appellant refused to answer were "pertinent to the question under inquiry."

In answer to questions from the Committee or its counsel, appellant testified fully to a great many matters very few of which were within the cognizance or jurisdiction of Congress. His testimony appears in full in the Record (pp. 26–72), and is digested, though imperfectly, in the indictment (*ante*, pp. 9–13). He testified to the organization of the California Petroleum Corporation, the sale and flotation of its securities, the syndicate operations in connection therewith, and the activities of his own firm and of other firms which were interested in the syndicate. He was asked whether any national banks had participated in the syndicate and he answered no. He was then asked whether any national bank officers were members of the syndicate. He replied in detail that there were fifteen officers of national banks who were members of his syndicate. They were connected with seven national banks, four of which were in New York, two in Chicago and one in Detroit. He testified further that it was customary to offer syndicate participations to national bank officers and sometimes to national banks themselves (p. 48).

The fourth partner in the syndicate is a private banking firm and wholly beyond any Congressional supervision or inquiry. The court below did not hold that the appellant was obliged to answer this question, but made its finding solely upon the supposed right of the Committee to exact an answer from the witness as to the other question asking for the names of national banks and its officers of national banks who participated in the syndicate. As the appellant had testified that no national banks participated therein, the question is limited to the names of these particular national bank officers. This, with the other question as to the name of the fourth partner in his syndicate, are the only two questions which he refused to answer. This constitutes his alleged contumacy.

a

It is submitted that the Committee was without power to compel appellant to answer either of these two questions because they were not pertinent "to the question under inquiry." The question under inquiry is identified by the preamble reciting that it was charged that national banks were engaged in the "promotion, underwriting and exploitation of speculative enterprises and in the purchase and sale of securities of such enterprise," and the similar recitals of the Resolution (Record, 12). If such were true, the Committee might desire to recommend remedial legislation concerning it. Indeed, if Congress deemed the practice an evil, the rumor of its existence was sufficient for it to enact legislation against it. Much more did it become sufficient for the purpose of Congress when the Committee learned from the testimony of the appellant that while no national banks participated, national bank officers were in the syndicate, and that it *was customary* to offer syndicate participations to national bank officers and sometimes to national banks themselves. The Committee then had all the information it required or could use to recommend or frame legislation which would forbid the recurrence of this practice, if it considered that it should be stopped. The fact which the Committee was charged to ascertain was whether national banks or their officers participated in these transactions; not who they were. It had no concern with the identity of the banks, or of the particular bank officers. In this case there were no national banks involved. Consequently, the sole information which the Committee attempted to get and which the appellant refused to supply was the *names* of the national bank officers who were in the syndicate.

This information was entirely unnecessary and immaterial. The Committee had been informed of the only important fact, namely, that *national bank officers were in this particular syndicate* and that it was the *general custom* to offer participations to national bank officers and to the national banks themselves. This was the only question on which the Committee could have made a finding. A further finding

as to the names of the officers would be irrelevant and surplusage. Congress could not be interested in their names. It is not a court and could not visit the particular individuals with any penalties even if the act of participating in such a syndicate were an offense; it could not remove them from their position; it could not legislate with respect to them individually; it could not deal with them personally at all. The information already given by the appellant as to the fact of national bank officers being in this particular syndicate and that it was the general custom to offer participations to bank officers and to banks themselves was the basic and the only information which Congress could possibly need, or could employ, in order to legislate on the subject. The power of Congress to conduct an inquiry in aid of legislation was discharged fully when it thus obtained the information necessary to legislate. If the questions which appellant refused to answer called for information which was not necessary, the questions were "not pertinent to the question under inquiry." Therefore, when the Committee pressed the appellant to state the names of his associates who happened to be national bank officers it was not asking him for any information provided to be ascertained by the resolution or which the Committee was entitled to know in order to recommend or frame remedial legislation concerning national banks. It was endeavoring merely to make him divulge the list of his syndicate names. Even though the Committee was entitled to know the actual fact whether national bank officers took part in these syndicates, it exceeded its jurisdiction when it attempted to go further and pry into the list of syndicate names. Such inquiry was not authorized either by the resolutions or by the general powers of Congress. It would be only an offensive inquisition into the private affairs of appellant's clients. He had tesified very fully to many matters as to which the Committee had no right to inquire, and he refused to answer these questions, not in a spirit of contumacy, but only because the answers would divulge the private affairs of others who had become his associates in the syndicate, under the usual relation of business confidence. Honor forbade the sacrifice of this confidence except through legal compulsion. Being advised by counsel that

the law did not so compel, appellant, as an honorable man, had no choice but to refuse answer.

In *Matter of Barnes*, 204 N. Y., 108 (1913), the Court of Appeals upheld Barnes in his refusal to disclose his private business affairs to a committee of the Legislature investigating alleged corruption in Albany upon the ground that the information which he refused to disclose *was not necessary to the inquiry*. The statute under which the proceeding was brought provided for the commitment of a witness "who refuses without reasonable cause * * * to answer a legal and pertinent question before such Committee." (Code of Civil Procedure, Sec. 856). A committee had been appointed, pursuant to a current resolution of the Senate and Assembly, to investigate charges of corruption and maladministration in the public offices of the City and County of Albany and to report recommendations for remedial legislation. The witness Barnes, described as "a leader of the dominant political party in Albany County," was brought before the Committee by subpœna and was directed to produce the ledgers and books of original entry showing the business of the Journal Company, a corporation of which he was the president. He was also asked certain questions with respect to his connections with the J. B. Lyons Company, a corporation which had furnished Albany County with printing for a period of ten years and of whose stock Barnes held 750 out of an issue of 3000 shares. He was asked when he got his stock, whether he paid anything for it, whether he had talked to Mr. Lyon about the consideration for the stock and whether the stock was a gift to him. Barnes refused to answer the questions, and also to submit the books of the Journal Company but offered to furnish the Committee verified copy of the contents of the books showing the dealings for the period desired with the City, County and their officials. Upon the hearing in contempt proceedings it was adjudged that the witness be committed until he answered the questions and produced the books of the Journal Company showing its business "with various departments of the City and County of Albany and with persons and corporations transacting business with said City and County for the past ten years."

The Court of Appeals reversed the Special Term and upheld Barnes in his refusal to answer the questions and produce the books. It held that the information which the witness offered to give the Committee as to the contents of the *books was all that was necessary for the Committee's purposes and the witness was entitled to stop his testimony at that point* and to refuse to answer the questions. The Court said (p. 115):

"Taking up the question of the right to compel the witness to produce the books of the Journal Company of which he was the President, I think it turns upon whether their production became necessary to the inquiry set on foot through the Legislative Committee. If the evidence before that body was a sufficient showing of the character of the dealings and of the methods of the Company in transactions with the Departments of the City and County Government, then I think it was not, in the language of Section 354, 'a proper case' to insist upon laying bare the corporate books. The Committee wanted such evidence of abuses or of corrupt practices or of such official misconduct as would enable it to 'report the information required by the resolution * * * with such recommendations as the public interests required.' It was not a proceeding against the corporation itself; for it was brought into the investigation incidentally to a general inquiry into the conduct by the officers of the municipal government. The Committee was not collecting evidence to visit the corporations with pains and penalties. It was an investigating body seeking material for general legislation. * * * What the citizen may refuse to do is referable to his constitutional rights, but a corporation does not stand upon the same ground. It receives its charter subject to the reserved right of the Legislature to inquire into the exercise of the franchises and privileges conferred. Therefore it is that when the witness, Barnes, refused to produce, or to allow to be produced, the corporate books, his refusal cannot be supported on any other ground than that the committee had all the information upon the subject of the inquiry touching the Journal Company's relations with the city and county departments that was necessary for its general purposes and that to allow an examination into the business of the company, generally, as it would be revealed in its books, was improper and without jurisdiction."

If this restriction apply even in the case of a corporation, *a fortiori* must it be true where the citizen and his constitutional rights are involved; and still stronger in the case of Congress whose powers of investigation are much more limited

than those of a state legislature. As we show in the case at bar that the information given by the appellant to the sub-committee was sufficient for its purposes, so the Court of Appeals of New York held (p. 116) that

"The evidence showed the practices of the company in its transaction of the public business and its methods in dealing with public officials, *sufficiently, for the committee to frame recommendations, if any were deemed needful, for further legislation in the public* *interest.

And further (p. 118):

"I think that with the information furnished, and offered to be furnished, the committee unwarrantably insisted upon an examination of all the entries in the corporate books. Having the admissions and knowledge, which the evidence afforded it, whatever conclusion it might lead to, to permit the committee to proceed to the desired length would be unnecessary to the object of its inquiry and make offensively inquisitorial a proceeding not visitatorial in its nature, in the sense of being instituted for the inspection and control of the corporation itself. I think it was not 'a proper case' for compelling the witness to bring the corporate books."

In the case at bar the court below held that, although the appellant had given the sub-committee the information that the national bank officers engaged in participations, the committee might ask their names so as to obtain "cumulative informa-

---

* Here the Court summarized what had been testified to before the Committee:

"It appeared in evidence that the Journal Company published the Albany Evening Journal, a daily newspaper, in the city of Albany. The Argus Company had the contract to print the proceedings of the common council and the reports of the various officers and departments of the city. These would be kept in type. Copies would be ordered from the Journal Company by officials, which would obtain them from the Argus Company. The Journal Company would deliver them and receive twenty-five per cent. of the cost price, without other service than turning over the order to the Argus Company. The Argus Company, also, paid to the Journal Company fifteen per cent. of the amount received by it from its printing contracts. Printing for the city officials was done by the Journal Company without competitive bidding, by dividing an order, when in excess of $250, the figure at which competitive bidding was necessary for city work. The Journal Company had been paid by the state for bills, after audit by the state comptroller, for the printing of the Session Laws for a period of twelve years, when, as it is charged, it had done no such printing, except as it was done from forms purchased from others. These facts had been testified to and Barnes offered to furnish the committee with true copies, verified, of the contents of the corporate books, which showed all the dealings for the period in question with the city and county, and with their officials.

tion" on that point. The court fell into a curious error in supposing that where the fact to be ascertained was whether national bank officers engaged in syndicate transactions, and such fact was ascertained, the names of the officers could be cumulative information on the point. The court says:

"The fact that the committee had already heard testimony to the effect that such officers engaged in participations, did not preclude the Committee from obtaining cumulative information upon that point. The Committee may have considered it desirable to make this inquiry in numerous instances, with a view of ascertaining whether such participations were engaged in frequently and throughout the country, or only by the same set of officers of the same national banks, or whether such engagements were only occasional. As a result of such inquiry Congress may have drawn conclusions upon which to base legislation" (Record, 341).

The names of the officers could not be cumulative to the testimony that such officers accepted these participations. Nor could such knowledge throw light on any other phase of the subject as suggested by the court below. It could make no difference "whether such participations were engaged in frequently and throughout the country" or "were only occasional" or whether only these same officers were so engaged. If the committee had learned that the practice was pursued by a single officer on even a single occasion and Congress deemed it wrong, no additional information could be needed by the Committee to legislate against it. It had all the necessary information then and there. But the Court says that "as a result of such inquiry Congress may have drawn conclusions upon which to base legislation." The answer is that Congress did draw conclusions and did base legislation on them; for the Committee accepted the testimony of appellant and recommended legislation and drafted a bill prohibiting national banks and national bank officers from engaging in such syndicate enterprises (Record, pp. 238, 241, 242).

The committee states in its report (Record, 123) that the information sought from Mr. Henry was germane to the question "whether national bank officers are being influenced by any form of reward to lend the money of their banks on non-listed and unseasoned stocks. It was impossible for the com-

committee without knowing the identity of the banks and officers to determine whether these participations to officers were given for the purpose of inducing the banks they served to accept these securities as collateral for loans or whether they were so accepted." As stated above (page 18), the committee avoided questioning Mr. Henry as to this. Had he been asked whether participations were given for such purpose, or for what purpose, if any, he would, at least, have had an opportunity to repudiate this suggestion of improper conduct.

But let us assume that the witness had disclosed the names of the bank officers, and that the latter had been called, and had either admitted or denied that they had been influenced in their official capacity by their participation in the syndicate; how could such admission or denial affect the question of the desirability of legislation prohibiting such participation?

This was the view taken in the *Barnes case* by the Special Term when it drected Barnes to answer questions as to whether he had paid anything for his stock in the printing Company, and why it was given to him, after it had been testified that he, a political leader, had such stock interest in the Company which was the beneficiary of the County's printing business. The Court thought the information would throw more light on the subject whether

" a person in that position had acquired a substantial stocking interest in a company, which furnished printing to a large amount to the political sub-division in which he was a figure of power, without any adeqate compensation therefor, and whether his species of patronage had been given to the company in return for an ownership, or interest."

After quoting this ruling of the Special Term, the Court of Appeals said:

" Granting that it was the fact and that the stock was given to Barnes, it was his private affair and, notwithstanding his position in the political world as a ' leader ' of his party in the county, I think that the committee exceeded the true scope of its jurisdiction, when seeking to elicit such evidence by their questions. * * * The fact of his interest in a company, which was contracting and dealing profitably with the municipal departments and public officials, was made known *and the committee could make such inference*, and *deduce such con-*

clusions therefrom for its report, as its members might deem to be justified. The committee could not be aided, within the proper legislative province of its inquiry, by the knowledge of how Barnes had obtained his stock. He owned it and the time when he got it, or the consideration for it, were matters quite immaterial and beyond the jurisdiction of the committee to inquire into. Section 856 requires that the questions to be answered shall be 'pertinent'; that is, they must be pertinent to an inquiry of the investigating committee into the necessity for remedial legislation. 'No person can be punished for contumacy as a witness before either house unless his testimony is required in a matter into which the house has jurisdiction to inquire, and * * * neither of those bodies possesses the general power of making inquiry into the private affairs of the citizen.' (*People ex rel. McDonald v. Keeler*, 99 N. Y., 463, at p. 478). This was observed with respect to the houses of Congress; but the remark is equally applicable to those of the state legislature. If Barnes had the right to acquire an interest in the Lyon Company, which may not well be disputed, and used his political influence in aid of its business, *the committee has the fact and is able to form its own conclusions as to the desirability of recommending any further remedial legigislation, in aid of a moral, economical and efficient administration of government by the municipalities of the state. To find out whether Barnes paid for his stock or not, would not aid the legislative body in that respect*" (p. 119).

And in the concurring opinion of WERNER, J., it was said:

"The statute (Section 856) directs that if a person subpœnaed, etc., refuses without reasonable cause 'to answer a legal and pertinent question', he may be dealt with according to its provisions. What is a legal and pertinent question? Obviously one that violates no legal right of the witness, and that is pertinent—that is relevant and material—to the purpose of the proceeding or investigation in which the witness is being examined. If the question goes beyond this limitation, it is illegal and impertinent and the witness cannot be compelled to answer it. Who is to decide whether a question is legal and pertinent? *If a legislative committee or its counsel are to be the final arbiters upon this important limitation, it is an idle ceremony to appeal to the courts.* It seems to me that the plain import of the words 'legal' and 'pertinent', as used in the statute, is to confine the proceeding within lawful bounds and proper methods with respect to the legal rights of the individual who is called upon to testify, and when he challenges the legality and pertinency of the information sought from him, it presents a question of law for the courts to decide" (p. 125).

After referring to the ownership of stock in the printing Company and the questions asked Barnes as to what he paid for the stock and how he acquired it, Judge WERNER continues:

"Neither would the answers to any of these questions throw any light upon the propriety or necessity for recommending future legislation designed to regulate, limit or forbid the letting of municipal contracts to corporations having stockholders of political influence who have paid nothing for their stock. *If that is an evil which can be reached and remedied by legislation, no amount of probing into the private affairs of any individual can make the necessity for such action more apparent or urgent*" (p. 126).

It will be noted in this case that the question of whether or not "the various matters for investigation recited in the extremely broad resolution of the Legislature are within the legitimate scope of a legislative inquiry" was not discussed. The point of the decision was that the questions asked and the evidence sought were not "*legal and pertinent*" because *they were not necessary for the purpose of the investigation.* Considering that Congress has only a grant of enumerated powers and possesses no general or undefined powers such as reside in the State Legislatures, how much stronger does this decision apply to the case at bar. When the Committee had learned of the fact that national bank officers were members of this syndicate and that it was customary for national bank officers and also national banks to participate in such transactions, there is no further information which it could require in order to legislate against the practice if it were thought an evil. The knowledge of the names of the officers could not possibly be necessary. If unnecessary it could not have legitimately influenced the mind of the Committee, and hence it was not pertinent; and if not pertinent, the appellant rightfully declined to answer.

Conceding the right of the Committee to exact information from the appellant as to the questions which were pertinent to the matter under inquiry, it does not follow that the Committee is authorized to indulge in a roving examination into the private affairs of appellant merely because they happen to be incidentally connected with some facts which the Committee is entitled to know in order to discharge its legislative function. Once the Committee has learned the facts

which are adequate for its purpose, it exhausts its power ; any further inquiry cannot be supported upon the ground of necessity and it becomes a gratuitous inquisition.

As we have shown (*ante*, p. 53, *et seq.*) the only ground upon which the sacrifice of privacy of a citizen's affairs may be justified is that of necessity. Upon this ground the courts of justice compel a person to testify as to his private affairs where the testimony is necessary for the doing of justice as between others. As Professor Wigmore points out :

" When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused ; * * *. On theother hand, if this duty exists for the individual to society, so also he may fairly demand that society, so far as the exaction of it is concerned, shall make the duty as little onerous as possible. He may demand that the compulsion be relaxed so far as it is not indispensable for the ascertainment of truth* * * and that the law in general be so formed as to reduce to a minimum the necessary sacrifices made by the witness in the name of duty."

Wigmore on Evidence, Vol. III., Sec. 2192, p. 2967.

No other ground justifies the compulsion of testimony in legislative proceedings. The power of Congress to compel testimony of a citizen is not expressly conferred by the Constitution. If it exist at all where, as in the case at bar, a Sub-Committee of one House of Congress is conducting an inquiry in aid of legislation, it is because implied as necessary to Congress for the execution of its express power of legislation. If in the particular question asked it is not necessary, then the power ceases. The citizen's duty to the Legislature to disclose his private affairs ends when it is not necessary for the Legislature to know them. There must be necessity. Thus, in *Burnham v. Morrissey*, 14 Gray, 226 (Mass., 1859) although the power of the House to coerce testimony was upheld, it was suggested with respect to the production of private papers that " such parts only as were relevant might have been exhibited and the others protected from exposure." A like caution was observed in *in re Falvey*, 7 Wis., 630 (1858) where, in support-

ing the committment of a witness for contempt in refusing to appear before a legislative committee investigating alleged corruption in connection with the property of which the State was trustee, it was recognized that there must be a limit to the range of the inquiry. The Court said (p. 637):

"Still it is said that this power of the Legislature to investigate must have a limit somewhere, otherwise a committee might for partisan and malicious purposes penetrate and drag to light the most secret and private matters of any citizen of the State."

In *Briggs v. Mackellar*, 2 Abb. Pr. Rep. (N. Y.), 30 (1885), a case involving the power of a lower legislative body to coerce testimony, it was said that "any inquiry they make must be clearly within the scope and object for which they exist as a political body."

It cannot be that a legislative committee may force testimony from the citizen because as the District Court thought "as a result of such an inquiry Congress may have drawn conclusions upon which to base legislation" (Record, 341).

What has the Committee demanded which appellant refused? Merely the names of the national bank officers, a disclosure to that extent of the list of members of a private syndicate. Such information could furnish the basis for no legislation. Even if it had been volunteered, it would have been immaterial; the Committee must have disregarded it in its recommendations. What information the appellant gave to the Committee was all that could be necessary for its purposes. This is so obvious that its own statement is its proof. But if any other proof were needed, it would be found in the fact that the Committee accepted the testimony of appellant as adequate for its purposes and based thereon its recommendations for remedial legislation. The information given by appellant enabled the sub-committee to cover every branch of inquiry which the resolution directed it to pursue. The Report of the Committee recommends the amendment of Section 5146 R. S. U. S. by the passage of Section 14 prohibiting national bank officers from engaging in syndicate transactions, and of Section 15 prohibiting national banks from similar activities (Record, 236, 241, 242). It is apparent that these recommendations were the only ones which the Committee could make under

the terms of the resolution as to the conduct of national banks and their officers. In no possible way could the names or identities of any national bank officers figure or be used in such recommendations.

(b)

The questions were not pertinent to the question under inquiry for the additional reason that the knowledge of the names of the national bank officers would not have enabled the Committee to examine, through them, or through any other person or persons, into the transactions or affairs of the banks themselves.

The refusal to disclose the names of the national bank officers who had participated in the California Petroleum Syndicate did not deny the Committee any information through which it might have carried its investigation further as to the transactions or affairs of the national bank officers or of the national banks themselves.

The real purpose of the Committee in attempting to extort from the appellant the names of the national bank officers, is shown by the statement which the Committee makes in its formal report :

"Mr. Henry, of Salomon & Co., who was called as a witness in regard to this transaction having refused to divulge the names of the national bank officers who received participations in this syndicate, his contumacy was certified to the House and from there to the United States Attorney for the District of Columbia for prosecution under sections 102, 103 and 104 of the Revised Statutes. Your committee is of opinion that the information sought from Mr. Henry is germane to the question, *national bank officers are being influenced by any form of reward to lend the money of their banks on newly listed and unseasoned stocks?* It was impossible for the committee without knowing the identity of the banks and officers to determine whether these participations to officers were given for the purpose of inducing the banks they served to accept these new securities as collateral for loans or whether they were so accepted" (Record, p. 123).

This careful definition of the attitude of the Committee toward the information sought of appellant demonstrates that the information could not be "germane" or pertinent for any such reason. Any examination in this way into the transactions of the banks, into the use of their moneys,

or their loans, and any effort thus to ascertain whether the banks had accepted "newly listed and unseasoned stocks" for collateral, *would be purely visitation.* The excuse offered for such visitation, that the committee desired to obtain information to recommend remedial legislation, would be unavailing for the reason that neither House of Congress has any jurisdiction to obtain information in this way. Congress has precluded itself from such inquiry, and *a fortiori* one House of Congress, much less a sub-committee, cannot accomplish by indirection what both houses have disabled themselves from doing directly. As this Court said in *Kilbourn v. Thompson, supra,* at page 182:

"Of course neither branch of Congress when acting separately can lawfully exercise more power than is conferred by the Constitution on the whole body, except in a few instances where authority is conferred by either House separately, as in the case of impeachments."

Congress has prescribed the sole method of the visitation or supervision of national banks. The statutes * relating to the National Banking Associations and to the Comptroller of the Currency provide the complete and exclusive method of examining into the affairs of national banks, of the supervision over them, and of reports by them and the Comptroller of the Currency; and his deputies alone have authority to visit and inspect these institutions. Section 5240, as amended by the Act of February 19, 185, 18 Stat. L. 329, provides, *inter alia,* that the Comptroller, with the approval of the Secretary of the Treasury,

"shall as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association. He shall have power to make a thorough examination into all the affairs of the association and in doing so to *examine any of the officers or agents thereof under oath,* and shall make a full and detailed report of the condition of the association to the Comptroller."

* The visitorial powers authorized by the National Banking Act and the amendments thereto are contained in the Act of July 12, 1862, chapter 290, section 3; the Act of June 3, 1864, Chapter 106, Section 17; the Act of June 3, 1864, Chapter 106, Sections 40, 41 and 44; the Act of March 3, 1869, Chapter 130, Section 2; and the Act of June 3, 1864, Chapter 106, Section 54. These acts provide for various reports by the National Banks and for the "thorough examination into the affairs" of National Banks by bank examiners and the Comptroller of the Currency.

The information which he derives as to the condition and operation of national banks is intended ultimately for the benefit of the Congress, for by Section 333 of the Revised Statutes, as amended February 18, 1875 (18 Stat. L., 317), the Comptroller is directed to make reports to Congress at the commencement of each session, exhibiting, first,

" a summary of the state and condition of every association from which reports have been received the preceding year * * * and such other information in relation to other associations as in his judgment may be useful ; third, *any amendments to the laws relating to banking by which the system may be improved and the security of its holders of its notes may be increased.*"

In making this provision Congress intended to prohibit indiscriminate legislative investigations into national banks, for it specifically said so in Title 62 of the National Banking Act, Chapter 4, Section 5241 (Act of June 3, 1864, Chap. 106, Sec. 54), where, after referring to the various provisions relating to national banks, above quoted, it provided

" no association shall be subject to any visitorial powers other than such as are authorized by this title or are vested in the courts of justice."

In the case of *Guthrie v. Harkness*, 199 U. S., 148 (1905), this Court held that these provisions constituted the full measure of Federal supervision over national banks (pp. 158-9 :

" The right of visitation being a public right existing in the State for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, Congress had in mind in passing this section that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, * * * It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. *Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.*"

The mere resolution of one House cannot override the statutes of both Houses of Congress. House resolution No.

504 attempts to direct the Comptroller of Currency and the Secretary of the Treasury

" to comply with all directions of the committee for assistance in its labors, to place at the service of the committee all the data and records of their respective departments, to procure for the committee from time to time such information as is subject to their control and inspection, and to allow the use of their assistance for the making of such investigations with respect to corporations under their respective jurisdictions as the committee or any such committee may from time to time request " (Record, p. 15, par. 5).

Relying upon this pretended authority the Committee, through its counsel, applied by letter of September 24, 1912, to the Comptroller of the Currency to have that officer secure certain data for the Committee's purposes in conducting this inquiry. The Comptroller declined to honor the request. Upon application to the President to compel the Comptroller to supply the information, the matter was referred to the Attorney General for his opinion as to whether the Comptroller was subject to the orders of the Committee in this behalf. In his opinion, dated November 9, 1912, the Attorney General held that these sections of the resolution (which were directed toward compelling the Comptroller of the Currency to furnish information for the Committee) were void.*

---

* Op. Atty. Genl., vol. 29, pp. 585 *et seq.* After referring to the fact that the Committee first sought the information directly from the national banks themselves and that their officers declined to furnish it, the Attorney General considers the legal basis for the effort of the Committee to have the information obtained by the Comptroller of the Currency. The opinion states that the counsel for the Committee explains why the information is desired, in part, because

" The committee desires to secure data showing (1) the character of the transactions in which *certain of the leading national banks of the country have been engaging such as the promotion and underwriting of securities on behalf of syndicates.*"

The Attorney General held that the paragraphs of the House resolution (Par. 5) relied upon by the Committee to compel the Comptroller and other executive officers to comply with the Committee's demands had no legal effect.

" The duties of the Comptroller," said the Attorney General, " are imposed by law and cannot be lessened or increased by resolution of one House."

Being thus thwarted in its efforts to procure information in this way and convinced that under Section 5241 the national banks were alone subject to visitation by the Comptroller of the Currency or in the courts of justice, the Committee caused a bill to be introduced in the House, May 4, 1912, amending Section 5241 so that it should read:

SECTION 5241. No association shall be subject to any visitorial powers other than such as are authorized by this title or are visited in the courts of justice *or such as shall be or shall have been exercised or directed by Congress or either* House thereof."

The House passed the bill on May 18, 1912. The Senate delayed action until July 31, 1912, when it was adversely reported from the Finance Committee. The Senate refused to pass the bill (Record, 87). The fact that this provision was enacted as a part of Section 21 of the Act of December 23, 1913, known as the Federal Reserve Act, is of no consequence. Whatever effect it may have, if it can have any, to ratify the exercise of visitorial power by the Committee which was unlawful at the time of its exercise, it cannot make the defendant guilty of a crime for refusing to be made the instrument of such usurpation. If this was the intent of the provision it is an *ex post facto* law in its most aggravated form.

Thus it appears that according to the Committee's own opinion it had no authority at the time of the appellant's examination to examine directly into the affairs of the national banks; or, to procure the information from the Comptroller of the Currency by compelling him to secure it according to the directions of the House resolution. Then it

---

After referring to Section 5240, which authorizes the Comptroller, with the approval of the Secretary of the Treasury, to appoint suitable persons to make examinations into the affairs of the banks, the Attorney General said:

"But clearly the Comptroller cannot exercise such power merely for the purpose of procuring information for a committee of one of the Houses of Congress on which that committee may base *its* conclusion as to what amendatory legislation is necessary or desirable. If the committee is without adequate powers to enable it to pursue the inquiry committed to it by the House (as to which I express no opinion), it should seek additional power by way of amendment to the law or by joint resolution to both Houses by a strained construction of the statutes of Congress. It cannot properly expect the Comptroller of the Currency to exercise a power given to him for a definite purpose to procure information for another purpose, thus *furnishing indirectly to the committee information which the law does not authorize it to get directly.*"

attempted to have Section 5241 amended by giving this authority to either House of Congress, but the Senate refused to pass such an amendment. Unable to obtain this information directly, the Committee endeavored to circumvent the law and obtain it indirectly by examining the officers of the national banks. That such could not be done appears too plain for discussion; and yet the only excuse for this attempt to force appellant to give the names of the national bank officers under penalty of imprisonment is the statement of the Committee above-quoted—that it wished to pursue this very course.

CONCLUSION. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED, AND THE APPELLANT DISCHARGED FROM USTODY.

Respectfully submitted,

JOHN C. SPOONER,
PAUL D. CRAVATH,
JOHN D. LINDSAY,
STUART MCNAMARA,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. [redacted]

GEORGE G. HENRY,
Appellant,
against

WILLIAM HENKEL, United States Marshal for the Southern District of New York.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S REPLY BRIEF.

JOHN C. SPOONER,
PAUL D. CRAVATH,
JOHN D. LINDSAY,
STUART McNAMARA,
Of Counsel.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

GEORGE G. HENRY,
Appellant,

AGAINST

WILLIAM HENKEL, United States Marshal for the Southern District of New York.

No. 639.

REPLY BRIEF OF APPELLANT.

The brief of the Government consists in the main of a contention that "*the points attempted to be made by appellant are not open in this proceeding*" (Appellee's brief, p. 1). It claims that this appeal is "an attempt by way of *habeas corpus* to avoid the effect of a warrant of commitment issued by a commissioner under Section 1014 R. S. after an express finding of 'probable cause.'" After reciting that "it is admitted that the appellant is the person charged in the indictment and that the acts charged therein were done by him in the District of Columbia" it concludes that "none of these contentions is open on writ of *habeas corpus* in removal proceedings" (p. 2).

This liberal notion of a citizen's right when the Government seeks to drag him from his home to stand trial in a distant jurisdiction is further unfolded in the Government's contention that "when a defendant has been permitted a hearing before the Commissioner as to his identity, his commission of the acts in the place charged, and the existence of

a *prima facie* case of offence against a law of the United States, he has had all the advantages to which his absence from the district where the offense was committed entitle him" (Page 10). This extraordinary position when analyzed, amounts to this: The defendant may be permitted a hearing before the Commissioner. But if in such hearing he admits his identity and that he committed the acts charged, he has no further rights. He must be removed as a matter of routine. He cannot show that the acts charged constitute no offense, or that the evidence given before the Commissioner fails to show the commission of any offence.

To state this proposition is to refute it. It is rejected flatly by this Court in the language of Mr. Justice PECKHAM in *Greene v. Henkel*, 183 U. S., pages 249, 261 (1902):

"We do not, however, hold that when an indictment charges no offense against the laws of the United States and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, the Court would be justified in ordering the removal and thus subjecting the defendant to the necessity of making such defense in the court where the indictment was found. In that case there would be no jurisdiction to commit nor any to order the removal of the prisoner."

This proceeding challenges the legality of the appellant's detention under the commitment issued by the Commissioner. The appellant contends that no offense is charged and that the evidence given before the Commissioner showed none, and that the latter is without jurisdiction to issue the commitment; hence that the appellant's imprisonment was without authority of law in violation of his rights, privileges and immunities under the constitution and laws of the United States (Petition, pp. 3-5; assignments of errors, pp. 343-5).

This involves no attack upon the indictment *as a pleading* (Benson v. Henkel, 198 U. S., 1, 1905). It is considered only *as the evidence in the case.* There is no effort to have the court on appeal revise the determination of the Commissioner as to the weight of the evidence *(Hyde v. Shine*, 199 U. S., 62, 1905). There is no evidence to weigh; there is no issue of fact. The inquiry is whether the whole evidence shows any offense. Nor is this an effort to avoid a trial in a court having

jurisdiction of a defendant's *person* (*Johnson v. Hoy*, 227 U. S., 245, 1913) or to preclude such a court from deciding questions which in the orderly course should be decided by it before resort is had to *habeas corpus* in such proceeding (*In Re Chapman*, 156 U. S., 211, 1894); or an attempt to employ the writ to perform the function of a writ of error (*Glasgow v. Moyer*, 225 U. S., 420, 1911).

IF THE EVIDENCE BEFORE THE COMMISSIONER FAILS TO SHOW ANY OFFENSE THE COMMISSIONER HAS NO JURISDICTION TO COMMIT THE ACCUSED AND THE LATTER IS ILLEGALLY DEPRIVED OF HIS LIBERTY.

In the case at bar the Government introduced in evidence the indictment and bench warrant and then rested. Appellant offered in evidence his testimony before the Committee and the Committee's report. The bench warrant, of course, is without probative force and the only evidence before the Commissioner was that furnished by the indictment, the appellant's testimony before the Committee and the Committee's report. The Government was free to offer any other evidence it desired, but it offered none.

The Government claims that the appellant was not entitled to contend before the Commissioner, or on *habeas corpus*, that the indictment does not set forth a crime. It states in its brief that the case of *Tinsley v. Treat*, 205 U. S., 20, " should not be, and, it is submitted, never has been, extended to defenses other than identity and commission of the acts charged " (p. 2). This statement of that case must be inadvertent, for the Court specifically said (at p. 20) that it is the duty of the Commissioner in a removal proceeding

" to look into the indictment, to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same."

In fact the Chief Justice, in delivering the opinion, quoted with approval an extract from the opinion of Mr. Justice JACKSON, then Circuit Judge, in *Greene's case*, 52 Fed., 104:

" The liberty of the citizen and his general right to be tried in a tribunal or forum of his domicile imposed upon the judge the duty of considering and passing upon those questions."

It is not claimed that the Commissioner should determine the sufficiency of the indictment as a pleading. All attacks upon an indictment as to matters of form or technical sufficiency belong to the court in which the indictment is found. Appellant makes no objection to the indictment as to its form. The question raised by appellant before the Commissioner and on this appeal is the sufficiency of the indictment *as proof, not as a pleading.*

In *Benson v. Henkel*, 198 U. S., p. 1 (1905) it was sought to avoid removal proceedings by challenging the sufficiency of the indictment as a pleading. The distinction above mentioned between considering the indictment as a pleading and as the evidence in the case was noted by this Court. Holding that inquiries into the technical sufficiency of the indictment are not proper in removal proceedings, the Court remarked:

"Indeed, it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a Federal Court of another District, and subject to be passed upon by such court on demurrer or otherwise" (p. 10).

But in so far as *the indictment is the evidence* on which it is sought to have the removal the Court said:

"Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another District from that to which the extradition is sought, the Commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause" (p. 10).

An indictment offered in evidence in removal proceedings supplies *prima facie* proof of the facts therein alleged *Greene v. Henkel*, 183 U. S., 249; *Beavers v. Henkel*, 194 U. S., 73, 84–85. *Benson v. Henkel*, 198 U. S., 1; *Hyde v. Shine*, 199 U. S., 62). The notion which formerly prevailed that this *prima facie* showing could not be rebutted was long since rejected and it is now beyond dispute that the person sought to be removed may not only show that the indictment states no crime against the United States, but may even offer evidence on his own behalf to rebut this *prima facie* showing where the in-

dictment does state a crime. In *Greene v. Henkel*, 183 U. S., 249, the Commissioner held the indictment *per se* conclusive proof of probable cause and rejected the proof offered by the accused in rebuttal. The District judge refused a warrant of removal and remanded the case to the Commissioner with instructions to receive the defendant's proof. The proof was received but the Commissioner again held the defendant, who then sued out a writ of *habeas corpus*. He omitted, however, to incorporate in his *habeas corpus* proceeding the evidence offered before the Commissioner. It hence resulted that the evidence was not before this Court on Appeal. It was held that in the absence of this evidence it must be assumed that the finding of probable cause was supported by proper proof. Mr. Justice PECKHAM, however, took pains to point out that where the facts established *prima facie* by the indictment, failed to constitute a crime and there was no other proof, there was *no jurisdiction to remove*. He said (p. 261):

"We do not, however, hold that when an indictment charges no offense against the laws of the United States, and the evidence given fails to show any, or if it appear that the offence charged was not committed or triable in the district to which the removal is sought, the court would be justified in ordering the removal, and thus subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. In that case there would be no jurisdiction to commit nor any to order the removal of the prisoner."

In the case of *Tinsley v. Treat*, 205 U. S., 20 (1907), effort was made to remove Tinsley from the Eastern District of Virginia to the Middle District of Tennessee for trial under an indictment charging violation of the Sherman Act. Tinsley offered to rebut the *prima facie* showing of the indictment by proving that the act was not committed in the middle district of Tennesse. The Commissioner rejected the proof and held him for removal. On appeal the specific question presented to this Court was whether he could rebut the Government's *prima facie* showing where the indictment (as in the case at bar), was the only evidence offered by the Government. The court held that the *prima facie* showing of the indictment could be rebutted. It

referred to the attitude taken by the lower court in refusing to receive the accused's proof and said :

"In other words, the indictment was in effect held to be conclusive. The Circuit Judge said, it is true, that probable cause must be shown in order to obtain a removal, but he held that inasmuch as the copy of the indictment alone was regarded as sufficient evidence of probable cause in *Beavers v. Henkel*, 194 U. S., 73, it was sufficient in the present case. In that case, however, no evidence was introduced to overcome the *prima facie* case made by the indictment except that evidence was offered as to what passed in the grand jury room, and rejected on that ground and not because it went to the merits" (p. 28).

Referring to Section 1014 of the Revised Statutes and to the function of the district judge in proceedings for removal thereunder the Court continued (p. 29):

"It has been repeatedly held that in such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same. * * * In the language of Mr. Justice BREWER, in delivering the opinion in *Beaver v. Henkel*, 194 U. S., 73, 83: 'It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that may be done under them. We must never forget that in all controversies, civil or criminal, between the Government and an individual the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting section 1014, Rev. Stat., which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial act.'"

The Court then referred to previous cases (*Greene v. Henkel*, 183 U. S., 249; *Beavers v. Henkel*, 194 U. S., 73; *Benson v. Henkel*, 198 U. S., 1; *Hyde v. Shine*, 199 U. S., 62), and called attention to the fact that where an offense was stated defectively in the indictment the

defendant might not attack the indictment as a pleading and that the Government was free at any time to supplement the proof furnished by the indictment by offering other proof and then came to the specific question whether the Government might claim that the indictment constitutes conclusive proof that the defendant has committed the offense charged. The Court says (p. 31):

"We regard that question as specifically presented in the present case and we hold that the indictment cannot be treated as conclusive under section 1014. This being so, we are of opinion that the evidence offered should have been admitted. It is contended that that evidence was immaterial, and, if admitted, could not have affected the decision of either the District or Circuit Judge. Of course, if the indictment were conclusive, any evidence might be said to be immaterial, but if the indictment were only *prima facie*, then evidence tending to show that no offense triable in the Middle District of Tennessee had been committed by defendant in that district could not be regarded as immaterial. * * * Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution" (p. 33).

In Pereles v. Weil, 157 Fed., 419 (D. C. Wis., 1907), SANBORN, J., examined the evidence before the Commissioner in reviewing the validity of his commitment in *habeas corpus* and decided that taken as a whole it did not establish probable cause and that the indictment stated no crime. His opinion collates the cases in a convenient summary:

"In an examination by the commissioner under section 1014, Rev. St., the indictment is presumptive evidence of probable cause as against the defendants (*Hyde v. Shine*, 199 U. S., 62, 25 Sup. Ct., 760, 50 L. Ed., 90; *Tinsley v. Treat*, 205 U. S., 20, 27 Sup. Ct., 430, 51 L. Ed., 689). In this proceeding it is necessary to be determined whether an offense against the United States has been committed, and whether there is probable cause to believe the defendants guilty (*In re Richter* (D. C.), 100 Fed., 295; *Horner v. U. S.*, 143 U. S., 207, 12 Sup. Ct. 407, 36 L. Ed., 126; *Greene v. Henkel*, 183 U. S., 249, 22 Sup. Ct., 218, 46 L. Ed., 177). Under the Sixth Amendment to the Constitution there is also a question whether the petitioning defendants shall be removed for trial to the district in which the indictment was found and whether the District Court of that District has jurisdiction of the offense charged

in the indictment. The Sixth Amendment to the constitution provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury within the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. It is also the rule in *habeas corpus* proceedings that in determining the question of probable cause, the court will not review the finding of the commissioner where the evidence is conflicting. The question is, whether the evidence as a whole supports the finding? *The Court may review the evidence to ascertain what it really shows, and if it finds that all the evidence taken together does not support the commissioner's finding of probable cause, his ruling may be disregarded and the defendants discharged* (*Ex parte* Rickelt (C. C.), 61 Fed., 203; *In re Byron* (C. C.), 18 Fed., 722; *Horner v. U. S.*, 143 U. S., 570; 12 Sup. Ct., 522; 36 L. Ed., 266; *Terlinden v. Ames*, 184 U. S., 270; 22 Sup. Ct., 484; 46 L. Ed., 534; *Ornelas v. Ruiz*, 161 U. S., 509; 16 Sup. Ct., 689; 40 L. Ed., 789; *Grin v. Shine*, 187 U. S., 181; 23 Sup. Ct., 98; 47 L. Ed., 130; *In re Wadge* (C. C.), 16 Fed., 332; *U. S. v. Peckham* (D. C.), 143 Fed., 625; *Hyde v. Shine*, 199 U. S., 62; 25 Sup. Ct., 760; 50 L. Ed., 90; U. S. Lantry (C. C.), 30 Fed., 283. *If the indictment is not sufficient on its face to show that an offense against the United States has been committed, the defendants should be discharged* (*U. S. v. Conners* (D. C.), 111 Fed., 734; *Greene v. Henkel*, 183 U. S., 249; 22 Sup. Ct., 218; 46 L. Ed., 177; *U. S. v. Lantry* (C. C.), 30 Fed., 232; *In re Byron* (C. C.), 18 Fed., 722; *In re Greene* (C. C.), 52 Fed., 104; *In re Doig* (C. C.), 4 Fed., 193; *In re Buell*, 3 Dill, 116, Fed. Cas. 2102; *In re Corning* (D. C.), 51 Fed., 205; *In re Terrell* (C. C.), 51 Fed., 213; *In re Wolf* (D. C.), 27 Fed., 606; *In re Huntington* (D. C.), 68 Fed., 881. If the indictment is good in substance, lacking only some technical averment of time or place or circumstance required to render it free from technical defects, the order for removal will be issued if the evidence supplies such defects, and shows probable cause to believe defendants guilty. *Greene v. Henkel*, 183 U. S., 249; 22 Sup. Ct., 218; 46 L. Ed., 177; *Tinsley v. Treat*, 205 U. S., 20, 31; 27 Sup. Ct., 430; 51 L. Ed., 689."

In the case at bar the appellant claims that no offense is charged and to that end argues that the matters stated in the indictment have no relation to sections 102–4, Rev. Stats., and are not within the scope thereof; that if these sections be employed to compel appellant to testify, Congress is attempting to exercise a power of coercing testi-

mony in aid of legislation which it does not possess. And he contends further, that on the other hand, even if the first two propositions be unsound, it still appears on the face of the indictment and the other evidence before the Commissioner that appellant did not refuse to answer any pertinent question and the evidence shows that there was no violation of sections 102–4. The question is jurisdictional—as to the jurisdiction of the Commissioner to hold appellant for removal. Appellant stands entirely upon this contention.

Certain Cases Cited by the Government.

The Government contends (p. 3) that "mere inconvenience or possible hardship to the accused cannot militate against" removal under Section 1014. Appellant does not contend to the contrary. No argument *ab inconvenienti* is made. Appellant contends merely that the record shows, affirmatively, that no crime has been committed anywhere. The brief further states (p. 4) that the rights of appellant are gratified fully when he has a chance before the magistrate in the removal proceedings to have a hearing as to "his identity and the commission of the acts when and as charged, is allowed to present evidence and a finding of probable cause is made." In other words, the hearing before the Commissioner is to consist more in sound than in substance. It is to be merely a form to be gone through with on removal proceedings. This position is wholly untenable and is repudiated by this Court. The "hearing" means a hearing as judicially understood in which the defendant may dispute the evidence against him and offer evidence in his own behalf. Nor can it be claimed that the Commissioner's mistake in considering the evidence sufficient to show a crime is mere error not reviewable on *habeas corpus*, for as this Court said respecting a similar contention where the Commissioner rejected the defendant's offer of proof:

"Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution" (*Tinsley v. Treat*, *supra*, p. 32).

The Government refers *In Re Chapman*, 156 U. S., 211, and says (brief, p. 8) :

"In the *Chapman* case the identical questions pressed in the case at bar were sought to be raised in a petition to this court for a *habeas corpus* and the court denied leave."

This is a clear misconception of what was decided in that case. Chapman appeared in the Supreme Court of the District of Columbia and demurred to the indictment. From the Court's decision he appealed to the Court of Appeals of the District of Columbia which affirmed the judgment below. He was remanded to the court below for trial. Instead of proceeding in the orderly manner he attempted to appeal to this Court through the medium of *habeas corpus* proceedings in which he raised various questions. This Court held that the decisions of the court below had been only on a demurrer to the indictment and that the case had not gone to final judgment in either court. The result of a trial could not be assumed. In the interest of orderly administration of justice this Court declined to exercise appellate jurisdiction until the conclusion of the proceedings, when, if judgment went against the petitioner and a writ of error lies, petitioner could review the case to this court. If, on the other hand, the writ of error did not lie and the lower court had no jurisdiction, the petitioner might then seek his remedy through *habeas corpus*. That case also involved a direct application to this Court for a writ of *habeas corpus*. *There was no removal proceedings whatever.*

This Court held that

" there were no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the District upon the merits of the case before them " (p. 218).

Certain other cases are cited by the Government which have no bearing on this appeal.

The case of *Riggins v. United States*, 199 U. S., 547, 551 (1905) is referred to (brief, p. 9) to show that appellant's questions are not open on this appeal. This case lends no support to the Government. It was not a removal case. Riggins was in custody in the Northern District of Alabama, Northern Division, under indictment found there in the Dis-

trict Court and was remitted under a *capias* for trial at the next session of the Circuit Court in that division and district. In order to escape trial he sued out *habeas corpus* and the Circuit Court, held by the District Judge, discharged the writ; from which order he appealed to this Court.

The case of *Glasgow v. Moyer*, 225 U. S., 421 (1912), is quoted by the Government (brief, p. 2). This case also was not a removal case. Glasgow was convicted in the District Court for the District of Delaware and was sentenced to the Atlanta penitentiary. After commencing his term he sued out *habeas corpus*, alleging irregularities in his trial, the prejudice of the trial judge and his disqualification to pass upon petitioner's motions in arrest of judgment and for a new trial because of his contention that the district judge became disqualified to hear motions or impose sentence by paragraphs 20 and 21 of the Judicial Code (Act of March 3, 1911, 36 Stat., 1087, Chap. 231, effective January 1, 1912).

In the case of *Johnson v. Hoy*, 227 U. S., 245 (1913), is relied upon by the Government (brief 2). This case was not a removal case. Johnson was indicted in the Northern District of Illinois, under the White Slave Traffic Act (June 25, 1910, 36 Stat., 825, Chap. 395). He was arrested in that District, where he resided, submitted to the jurisdiction of the Court and prayed bail which was fixed at $30,000, but with the provision that no surety would be accepted who was indemnified against loss and that the defendant should not be allowed to deposit cash in lieu of bond. Johnson applied for *habeas corpus* on the ground (1) that the bail was excessive and the terms thereof onerous and prohibitive; and (2) that the Act under which he was indicted was unconstitutional. His petition was denied and he appealed to this Court, where a motion was made to admit him to bail pending the hearing. On his motion the case was advanced to be heard with others, involving the constitutionality of the same act. His counsel took part in the argument of that question January 6, 1913. At that time this Court was informed by the Government that on November 15, 1912, Johnson had already perfected his bail, which was approved by the district judge, and he was released from arrest under the indictment. Nevertheless his counsel contended that he was entitled to argue the constitutionality of the

statute in this proceeding, the main purpose of which had been to effect his release on bail. The Court held that as he had secured the very relief which the writ of *habeas corpus* was intended to afford, the appeal must be dismissed. He could not employ the writ of *habeas corpus* to present prematurely to this Court the determination of a question which belonged primarily to the court below to whose jurisdiction he had submitted, and where he had given bail to appear for trial in due course.

Respectfully submitted,

JOHN C. SPOONER,
PAUL D. CRAVATH,
JOHN D. LINDSAY,
STUART MCNAMARA,
Of Counsel for Appellant.

No. 216

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

GEORGE G. HENRY, APPELLANT,

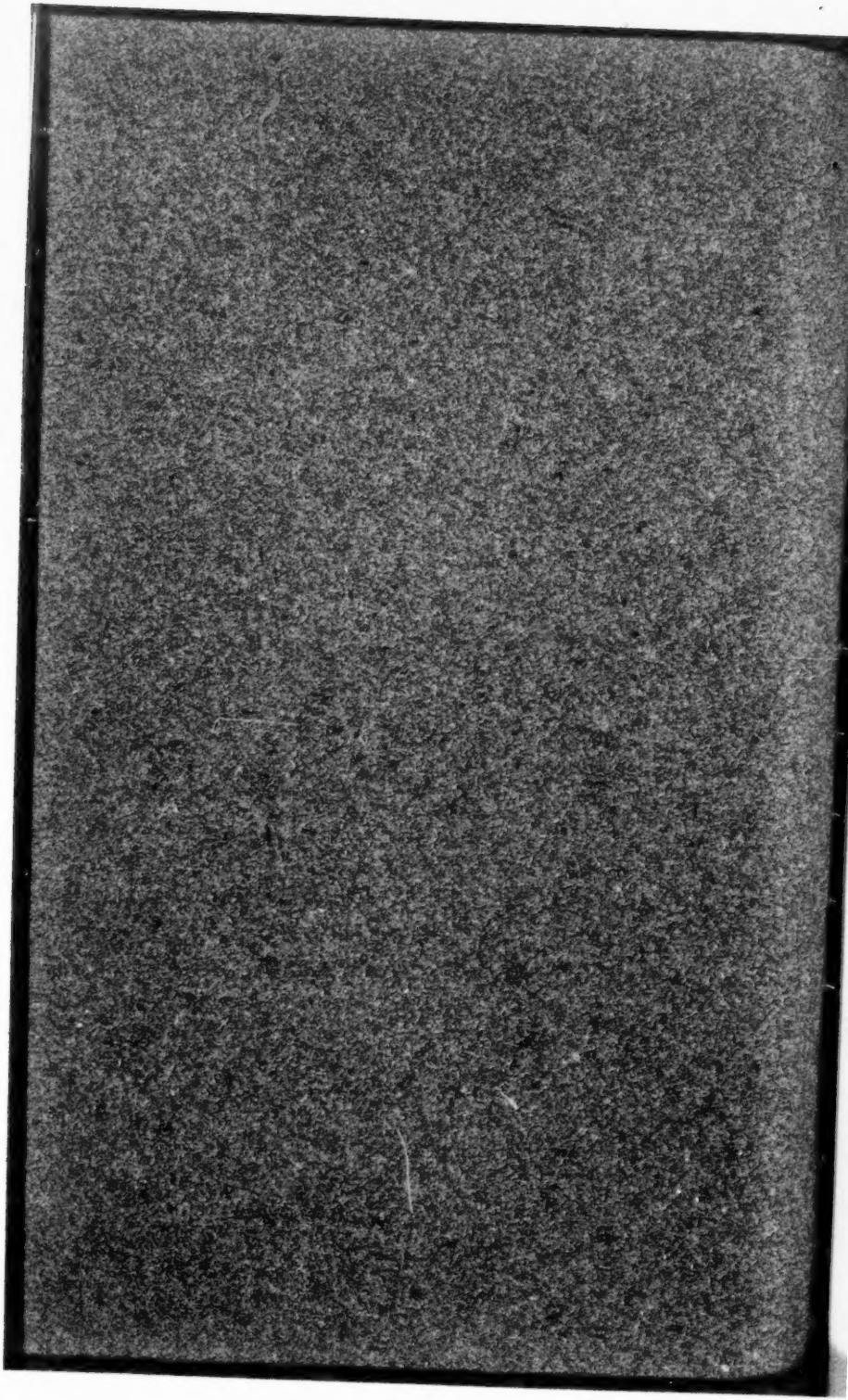
v.

WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1914.



INDEX.

29972—14——1

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

GEORGE G. HENRY, APPELLANT,
v.
WILLIAM HENKEL, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK. } No. 639.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

ARGUMENT.

I.

The points attempted to be made by appellant are not open in this proceeding.

As the statement of facts shows, this was an attempt by way of *habeas corpus* to avoid the effect of a warrant of commitment issued by a commissioner under section 1014, R. S., after an express finding of "probable cause" (R. 5). It is admitted that the appellant is the person charged in the indictment, and that the acts charged therein were done by him in

the District of Columbia. It is sought in this summary proceeding by an extraordinary writ to have this court consider the following propositions: (*a*) Section 102, R. S., should not be construed so as to cover questions asked by a committee of Congress investigating in aid of legislation; (*b*) if so construed, the act is unconstitutional; (*c*) the questions asked were not "pertinent to the question under inquiry" as required by section 102, R. S.

None of these contentions is open on writ of *habeas corpus* in removal proceedings. The writ was used and justified at the common law to enable a defendant to learn the charge against him and to be released on bail, if the offense were bailable. While its use has been much extended by American courts, the obstacles arising therefrom to the speedy and orderly disposition of criminal cases has led this court in recent cases to discountenance its use as a writ of error. *Glasgow* v. *Moyer*, 225 U. S. 420; *Johnson* v. *Hoy*, 227 U. S. 245. In *Tinsley* v. *Treat*, 205 U. S. 20, it was held that in a proceeding of this kind the petitioner was entitled to show to the committing magistrate that he had never done, in the district where he was indicted, the things charged in the indictment. That case should not be, and, it is submitted, never has been, extended to defenses other than identity and commission of the acts charged. It affords no warrant for such a proceeding as the present. On the contrary, such a construction is guarded against in the concluding paragraph of the opinion by the following language (p. 32):

> Appellant was entitled to the judgment of the District Judge as to the existence of probable cause on the evidence that might have been adduced, and even if the District Judge had thereupon determined that probable cause existed, *and such determination could not be revised on habeas corpus*, it is nevertheless true that we have no such decision here, and the order of removal can not be sustained in its absence. Nor can the exclusion of the evidence offered be treated as *mere error*, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution. (Italics ours.)

Section 1014 was passed merely to provide a procedure for apprehending throughout the entire extent of the United States persons charged with offenses committed in any part thereof. Such a procedure exists in every civilized State, and mere inconvenience or possible hardship to the accused can not militate against it. The criminal selects his own venue, and whether he go from one end of Texas to another, or from Maine to California, is a mere matter of degree. The same argument of inconvenience could be advanced on the other side, by insisting on the inconvenience to the Government of trying its case with an officer and before a court not familiar with the circumstances. The argument *ab inconvenienti*, on the one side as on the other, can be answered in the language of this court in *Hyde* v. *United States*, 225 U. S. 347, 364, saying: "Nor do we think that the size of our country has become too

great for the effective administration of criminal justice."

When, before a magistrate in removal proceedings, the defendant admits his identity and the commission of the acts when and as charged, is allowed to present evidence, and a finding of probable cause is made, to permit him thereupon to raise in *habeas corpus* proceedings the construction and constitutionality of the act on which he was indicted, and generally to enter into a discussion of the merits of his case—*e. g.*, in the case at bar, the pertinency of the questions asked—is beyond what his rights require. These questions can be as well presented to the Federal court which indicted him, and it must be assumed that he will there confront as able and impartial a judge as in the Federal district where he may be found. Certainly if he had remained in the district where the acts were committed and faced his accusers he would not have been permitted to appeal by way of *habeas corpus* from one Federal judge to another, and to allow him to do so on removal proceedings is but to give a premium to the criminal who flees.

In *Beavers* v. *Henkel*, 194 U. S. 73, 83, 84, 85, Mr. Justice Brewer, delivering the judgment of the court, said (p. 84):

> The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty. But

> the Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial. The existence of probable cause is not made more certain by two inquiries and two indictments. Within the spirit of the rule of giving full effect to the records and judicial proceedings of other courts, an indictment, found by the proper grand jury, should be accepted everywhere through the United States as at least *prima facie* evidence of the existence of probable cause. And the place where such inquiry must be had and the decision of a grand jury obtained is the locality in which by the Constitution and laws the final trial must be had.

In *Greene* v. *Henkel*, 183 U. S. 249, 261, the court said in *habeas corpus* to removal proceedings:

> Upon this writ the point to be decided is, whether the judge who made the order for the removal of the defendants had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it is not one which can be reviewed by means of the writ of *habeas corpus*.

In *Benson* v. *Henkel*, 198 U. S. 1, 10, 11, the court said:

> Indeed, it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a Federal

> Court of another District, and subject to be passed upon by such court on demurrer or otherwise. Of course, this rule has its limitations. If the indictment were a mere information, or obviously, upon inspection, set forth no crime against the United States, or a wholly different crime from that alleged as the basis for proceedings, or if such crime be charged to have been committed in another District from that to which the extradition is sought, the Commissioner could not properly consider it as ground for removal. In such cases resort must be had to other evidence of probable cause.
>
> * * * * *
>
> * * * An extradition Commissioner is not presumed to be acquainted with the niceties of criminal pleading. His functions are practically the same as those of an examining magistrate in an ordinary criminal case, and if the complaint upon which he acts or the indictment offered in support thereof contains the necessary elements of the offense, it is sufficient, although a more critical examination may show that the statute does not completely cover the case. *Pearce* v. *Texas*, 155 U. S. 311; *Davis's Case*, 122 Massachusetts, 324; *State* v. *O'Connor*, 38 Minnesota, 243; *In re Voorhees*, 32 N. J. Law, 141; *In re Greenough*, 31 Vermont, 279, 288.

In *Hyde* v. *Shine*, 199 U. S. 62, 84, the court said, confirming prior decisions:

> * * * It was held that the question whether the act charged was or was not a

> crime was one which the trial court was competent to decide, and which this court would not review upon a writ of *habeas corpus*.

And again:

> In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the Commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause. *In re Oteiza*, 136 U. S. 330; *Bryant* v. *United States*, 167 U. S. 104. * * *

In its latest decision, *Johnson* v. *Hoy*, 227 U. S. 245, 247, the court said:

> The writ of *habeas corpus* is not intended to serve the office of a writ of error even after verdict, and, for still stronger reasons, it is not available to a defendant before trial, except in rare and exceptional cases, as pointed out in *Ex parte Royall*, 117 U. S. 241. This is an effort to nullify that rule and to depart from the regular course of criminal proceedings by securing from this court, in advance, a decision on an issue of law which the defendant can raise in the District Court, with the right, if convicted, to a writ of error on any ruling adverse to his contention. That the orderly course of a trial must be pursued

> and the usual remedies exhausted, even where the petitioner attacks on *habeas corpus* the constitutionality of the statute under which he was indicted, was decided in *Glasgow* v. *Moyer*, 225 U. S. 420. That and other similar decisions have so definitely established the general principle as to leave no room for further discussion. *Riggins* v. *United States*, 199 U. S. 547.

The right to raise in such a way as this the points argued in the case at bar is determined adversely to the appellant in *In re Chapman*, 156 U. S. 211, unless it be held that section 1014, R. S., gives to a defendant in removal proceedings privileges far beyond what are necessary to protect him. In the *Chapman* case the identical questions pressed in the case at bar were sought to be raised in a petition to this court for a *habeas corpus* and the court denied leave, saying (pp. 217, 218):

> In the case before us, the question as to the jurisdiction of the Supreme Court of the District of Columbia has indeed already been passed upon by that court and also by the Court of Appeals, upon a demurrer to the indictment, but the case has not gone to final judgment in either court, and what the result of a trial may be cannot be assumed. We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings If judgment goes against petitioner and is affirmed by the Court

> of Appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. If, on the other hand, a writ of error does not lie to this court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of *habeas corpus*. We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the District upon the merits of the case before them.

This case was affirmed in *Riggins* v. *United States*, 199 U. S. 547, 551, where it is said:

> True, the present case is not one of the issue of the writ of *habeas corpus* in respect of confinement under state authority, nor of an application to this court for the writ, but is the case of custody taken under a capias issued on an indictment returned in the District Court and removed to the Circuit Court, and an application to that court for the writ before defendant had been compelled to take any step in the cause.
>
> Defendant might have raised his objections to the indictment by motion to quash or otherwise. If the indictment were held good, as we are advised by the opinion of the Circuit Court it would have been, defendant would have pleaded and gone to trial, and might have been acquitted. If convicted, the remedy by writ of error was open to him.
>
> There is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular

course of judicial procedure. That departure is contrary to the views we have heretofore explicitly expressed, and if we acquiesce in this method of invoking our jurisdiction, we shall find ourselves obliged to decide questions in advance of final adjudication, contrary to the settled rule, and to many decisions we have heretofore announced upon the subject.

If we should affirm or reverse the final order in this case, we should recognize a proceeding below, which we would not ourselves have entertained; and we are not disposed to hold that this manner of testing such questions as are argued here ought to have been pursued.

When a defendant has been permitted a hearing before the commissioner as to his identity, his commission of the acts in the place charged, and the existence of a *prima facie* case of an offense against a law of the United States, he has had all the advantages to which his absence from the district where the offense was committed entitle him. On other points he should be placed on an equality with the defendant as to whom removal proceedings are not necessary, and as to the latter it is settled, by the decisions last referred to, that none of the defenses raised in the case at bar is open on *habeas corpus*.

II.

Section 102, R. S., covers an investigation of the character undertaken in the case at bar.

The language of the act is "any matter under inquiry before either House, or any committee of either House of Congress." This plainly covers an

inquiry undertaken for the purpose of obtaining information to aid in the exercise of legislative powers, and it is so held in *In re Chapman*, 166 U. S. 661.

(*a*) Counsel for appellant go at great length into the circumstances under which the act of 1857 was passed, for the purpose of showing that it was enacted under pressure induced by charges of bribery of Members of Congress, and should be confined to that particular class of cases. Perhaps it might have been so confined, but as Congress chose to use general language, the inference is exactly contrary to that attempted to be drawn by counsel, and the citations from the debates on the act (*e. g.*, Apps. Brief, p. 44) show that leading Members of Congress understood the broad scope of the act, and relied on the provision for review by the courts to restrain inquiry within its proper bounds.

Long extracts are made from these debates. It is admitted that they are not relevant, but it is said they show the "environment." But the act of 1857 was divided, changed, and deliberately reenacted in the Revision. It is a far cry from the "environment" of 1857 to that of 1873.

(*b*) It is said (Brief, p. 31), that "this act does not provide for any judicial review of the pertinency or relevancy of questions before the witness becomes liable to punishment for refusing to answer," and the procedure is contrasted with that given by law to the Interstate Commerce Commission, and sustained in *Interstate Commerce Commission* v. *Brimson*, 154

U. S. 447. It is not easy to understand this argument. Under section 102, Revised Statutes, there must be an indictment, and a trial by jury according to rules of law laid down by the court before punishment ensues. In the other proceeding there is merely a summary hearing on petition before a judge without a jury, either grand or petit, followed by an imprisonment for contempt of court.

(*c*) Great names are seriously relied on (Brief, pp. 27–29) to show that this is a representative government, and such a government is pictured as one where the representative obtains his information by casual conversation with his constituents, using merely persuasion. Congress, we are told, could have had only this in mind when it passed section 102, R. S. Possibly this is one way to appraise legislative functions, and, taken in connection with the statement on page 89 of the brief, that the rumor of the existence of an evil is sufficient for Congress to enact legislation against it, it presents a comprehensive system for legislative action. Yet Congress may possibly have contemplated more exact procedure, and may have preferred to obtain the sworn testimony of persons familiar with the matter under inquiry which could be made a record and upon which a report could be based. Such a procedure is not without the terms of section 102, R. S., and this court could hardly deny to Congress the discretion to adopt a method analogous to that employed in judicial proceedings, nor construe section 102, R. S., so as to exclude it.

III.

Sections 102 et seq., R. S., are constitutional.

This is decided by *Kilbourn* v. *Thompson*, 103 U. S. 168, read in connection with *In re Chapman*, 166 U. S. 661. In the *Kilbourn* case (p. 199) the statement of law made by the Supreme Court of Massachusetts in *Burnham* v. *Morrissey*, 14 Gray, 226, where the right to compel witnesses to answer questions on inquiry in aid of legislation was upheld, is fully concurred in, and a different conclusion reached only because in the *Kilbourn* case the inquiry could result in no valid legislation on the subject to which it referred (103 U. S. 195). In the *Chapman* case questions similar to those put to appellant were held proper because they were not inquiries into the private affairs of the witness and were put in the course of an inquiry within the jurisdiction of the Senate. The argument that the *Chapman* case as a precedent must be confined to the punishment of Members of Congress and analogous matters is without force. It is true each House is made judge of the elections and qualifications of its Members, and may punish or expel them, but they are also given the power of legislation. In neither case is any express power conferred to summon witnesses in aid of execution of the power expressly granted or to punish them for failure to testify. It is as easy to imply it in the one case as in the other. The power is a necessary incident of the power to legislate, and has always been so considered. It gives the legislature eyes and

ears. In *Briggs* v. *Mackellar*, 2 Abb. Pr. (N. Y.) 30, 58, Judge Daly used the following language:

> * * * The right to examine witnesses, as a part of the ordinary and usual legislative machinery, would seem to follow as incident to the right to legislate, which has been conferred upon them; for it would be inconsistent to hold that they may, under the charters, exercise the power, and yet may not do what is essential to enable them to exercise it properly.

In *Wickelhausen* v. *Willett*, 10 Abb. Pr. (N. Y.), 164, 173, Judge Hoffman discussed the matter most elaborately in reference to the power of Congress, and said:

> Now, the power of investigation through a committee is essential to wise legislation. The power to call for information from others, flows from this necessity. Hence the old formula of authority to send for persons and papers. But to rob the process of such a committee of all compulsory effect, to reduce it to a request, to deny all means of enforcement and all power to punish for disobedience, would be to render inquiry often fruitless, to exclude sources of information, and to impair or defeat the objects of legislation.

This case was affirmed in *Wilckens* v. *Willet*, 1 Keyes (N. Y.) 521, 531.

In *People, ex rel. McDonald*, v. *Keeler*, 99 N. Y. 463, 482, the Court of Appeals said:

> It is difficult to conceive any constitutional objection which can be raised to the provision

> authorizing legislative committees to take testimony and to summon witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required, and, irrespective of the question whether in the absence of a statute to that effect either house would have the power to imprison a recusant witness, I cannot yield to the claim that a statute authorizing it to enforce its process in that manner is in excess of the legislative power.

In *Burnham* v. *Morrissey*, 14 Gray, 226, 239 the Supreme Court of Massachusetts said:

> The house of representatives has many duties to perform, which necessarily require it to receive evidence, and examine witnesses. It is the grand inquest for the Commonwealth, and as such has power to inquire into the official conduct of all officers of the Commonwealth, in order to impeachment. It may inquire into the doings of corporations, which are subject to the control of the legislature, with a view to modify or repeal their charters. It is the judge of the election and qualification of its members. It has power to decide upon the expulsion of its members. It has often occasion to acquire a certain knowledge of facts, in order to the proper performance of legislative duties.
>
> We therefore think it clear that it has the constitutional right to take evidence, to sum-

> mon witnesses, and to compel them to attend and to testify. This power to summon and examine witnesses it may exercise by means of committees.

The cases cited from the Privy Council of England, namely, *Kielley* v. *Carson*, 4 Moore P. C. 63, *Fenton* v. *Hampton*, 11 *ib.* 347, and *Doyle* v. *Falconer*, L. R. 1 P. C. 328, merely hold that a derivative assembly of an English colony has no power to punish for contempt by summary process of its own. They have no bearing on the power of Congress to pass an act providing for judicial proceedings on indictment in the case of recalcitrant witnesses, where the power of Congress to make the inquiry and put the particular questions is left to judicial decision and the penalty is fixed by law.

The gist of the argument of appellant on this point is stated as follows on page 51 of the brief:

> * * * The statute, then, applying only to the people at large, that is, private citizens who hold no office under the government, the inquiry is whether the people who have *delegated* the legislative power to Congress, and imposed upon that body the duty of making laws, can be compelled, under pain of fine and imprisonment to assist Congress in the discharge of those duties. We submit that Congress can no more demand this service from the people than the executive or judicial departments of the Government can call for a similar sacrifice to enable them to perform *their* respective functions.

This may be answered by the following paraphrase:

> The inquiry is whether the people who have *delegated* the judicial power to the Federal courts and imposed upon those courts the duty of construing the laws, can be compelled, under pain of fine and imprisonment to assist *the courts* in the discharge of those duties. We submit that the *courts* can no more demand this service from the people than the executive and legislative departments of the Government can call for a similar sacrifice to enable them to perform their respective functions.

Unless a power to compel testimony can not be implied from the power to make laws, but must be implied from the power to construe them, the paraphrase is as good an argument as the original.

Much is said in the brief passim as to the rights and privileges of the individual. No more important consideration could be urged, but if the power of investigation and the power to compel testimony in aid thereof exist in Congress—as they clearly do—the mere fact that such investigation may touch the private affairs of a citizen is no objection to its constitutionality. Under section 102 *et seq.*, R. S., the appellant is secured a judicial hearing on the legality of the investigation and the pertinency of the questions. To hold that in addition he is entitled to refuse disclosure of private matters would be to hamper unduly and beyond necessity the power of investigation. Such an objection could be made as reasonably in a proceeding to investigate alleged bribery of Members of Congress—in which case the

appellant apparently admits it would not be good—as in the case of an investigation in aid of legislation.

The questions asked the appellant are the same in character as those asked Chapman (166 U. S. 663). They do not involve *appellant's* private affairs, but those of third persons, an inquiry always permitted. *Grant* v. *United States*, 227 U. S. 74, and cases cited.

There was no unreasonable search or seizure, nor any requirement of self-incrimination. Outside of these two constitutional guaranties there is nothing in a constitutional sense which makes a broker's dealings with his client immune from investigation

IV.

The questions were pertinent to the inquiry.

Upon this point the nature of the inquiry authorizing the investigation must be examined, as well as the questions themselves. There can hardly be any doubt that the broad scope of the resolution—too broad it is claimed by appellant—justified the questions if fairly put. In considering the propriety of the resolutions, it should not be insisted that they must fall within any single, specific, designated, power of Congress.

(*a*) All the powers given to Congress by the Constitution over trade and commerce must be considered as a whole. The different individual powers must be looked at as interacting on and aiding the others. The taxing power, the power to borrow money, to regulate interstate and foreign commerce

to coin money, to establish post offices and post roads, while separated in the Constitution, necessarily in action overlap and constitute in reality a whole.

The case at bar is a good example. Two residents of California, owning the major portion of the stock in two corporations of that State, combine with brokers in New York to organize a holding company under the laws of Virginia. A large part of the stock, common and preferred, of the holding company is transferred to the brokers, who organize two syndicates—one in London and one in this country. The latter is composed of individuals and "banking institutions" doing business in New York and other States. Several of its members are officers of national banks. This syndicate being closed out at a profit before it was even fully organized (R. 50), the original bankers inaugurate a campaign on the New York Stock Exchange, a voluntary association doing business in New York City, and by means of fictitious transactions sell to the public at from 50 to 70 (R. 58) stock which cost nothing (R. 33, 34), and which they themselves held at 45 (R. 58). These sales it may fairly be assumed affected commerce from California to Virginia, and of course involved the use of the mails. Such transactions in the past have produced panics and have seriously deranged the currency and put a great strain on the whole machinery of credit. They have tempted officers of national banks to an improper and at times a criminal use of the resources of their institutions. Their influ-

ence upon interstate trade and commerce can not be calculated. In investigations of such complicated, far-reaching transactions, every fair discretion should be allowed Congress in the scope of its inquiry and in the character of the questions asked.

(*b*) Congress in passing laws is as much bound to observe the Constitution as the courts in construing them. Since the question whether a law is constitutional or not must, in many cases, depend upon the actual facts to which it is intended to apply, Congress may investigate to determine such facts, though it may turn out on such inquiry that the case falls outside the constitutional power of Congress. For example, whether the operations of the California Petroleum Company are such as to constitute interstate commerce might not be determinable until after an investigation into its method of business; and the same is true of the New York Stock Exchange.

(*c*) Congress has power to propose amendments to the Constitution, and to exercise this power judiciously might require an investigation into matters confessedly, at present, outside its constitutional powers. For example, before proposing an amendment authorizing woman's suffrage, Congress might investigate the working of such suffrage in the States where it is permitted, though confessedly such subject can not be legislated on by Congress at present.

Tested by the above considerations, there is nothing in the greater part at any rate of the resolution which can be said to be outside the proper authority of Congress in investigating in aid of legislation.

The main objection urged to the pertinency of the questions in the case at bar is that the committee had learned all it needed when it was informed that there was a fourth partner in the original combination, and that there were national bank officers interested in the subsyndicate. But surely whether to stop here or go further was a matter within the discretion of the committee. As said by Judge Cole in *In re Falvey*, 7 Wis. 630, 642:

> The very tranquillity and existence of the State might require that the utmost latitude as to form and subject matter of the questions proposed be allowed, in order to expose and bring to light some widespread conspiracy to overthrow the government or some combination to paralyze its powers by corrupting the high public officers under the government.

It is clear that in the *Chapman* case, if Chapman had admitted that Senators had dealt with him in sugar stocks, he would not have been excused from giving their names. Even in a court of law, bound by strict rules of evidence, such a limit would not be imposed to cross-examination. The proper test is whether the questions have some reasonable relevancy to the inquiry and whether they are fair; that is, not unduly prying and inquisitorial. Judged by these tests, the questions—which confessedly did not touch the witness's private affairs but those of others—were not improper. Not to rest satisfied with a statement that there were "banking institu-

tions" and national bank officers interested, but to desire knowledge who they were, where they did business, and to what extent, and how largely influential in interstate commerce and currency, is not inquisition. Indeed, if the demand for the names of the undisclosed parties had been due simply to a desire to call them as additional witnesses, would not the committee have been well within the bounds of its discretion?

The argument that an answer could only lead to an investigation of national banks, and that such an investigation would be forbidden by the prohibition against exercising visitorial powers contained in section 5241, R. S., is unsubstantial to a degree. It can neither be assumed that the answers would lead to any such investigation nor, if they did, that such investigation would be visitorial within the meaning of section 5241, R. S.

CONCLUSION.

The judgment below should be affirmed.

JOHN W. DAVIS,
Solicitor General.
W. C. HERRON,
Attorney.

FEBRUARY, 1914.

○